Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 7 September 2023 [1]

Case C-128/22

BV NORDIC INFO
v
Belgische Staat

(Request for a preliminary ruling from the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium))

(Reference for a preliminary ruling – Free movement of persons – National measures taken to control the spread of COVID-19 pandemic – Ban on 'non-essential' travel to and from countries considered to pose a high infection risk for travellers – Quarantine and screening test requirements for residents upon their return from those countries – Directive 2004/38/EC – Articles 4 and 5 – Rights of exit and entry – Restriction – Article 27(1) and Article 29(1) – Justification – Public health – Proportionality – Checks carried out to enforce the travel restrictions – Schengen Borders Code – Article 22 and Article 23(1) – Distinction between 'border checks' within the meaning of the first provision and the 'exercise of police powers' within the meaning of the second provision – Possibility of reintroducing border control at internal borders – Article 25(1) – Justification – Concept of 'serious threat to public policy' – Risk of severe disturbances to society caused by the pandemic – Proportionality)

I. Introduction

1. Among the 'non-pharmaceutical interventions' [2] put in place by the public authorities throughout the world in order to control the spread of the COVID-19 pandemic, limitations on the mobility of persons featured prominently. While lockdowns were the most drastic of those measures, restrictions on international movements were also at the forefront of the response. Indeed, at different points in time during the pandemic, States imposed entry and/or exit bans on their territory and tightened border control to enforce them.

[1] Original language: English.

[2] 'Non-pharmaceutical interventions' are public health measures, other than vaccination and the provision of medicine and medical treatment, which aim to prevent and/or control the transmission of a contagious disease in a community. See European Centre for Disease Prevention and Control (ECDC), *Guidelines for non-pharmaceutical interventions to reduce the impact of COVID-19 in the EU/EEA and the UK*, ECDC, Stockholm, 24 September 2020 ('the ECDC Guidelines').

2. The Member States of the European Union were no exception to that trend. During the 'first wave' of the pandemic, from March 2020 onwards,[3] not only did the Member States collectively ban entry *into* the European Union, partially sealing off 'fortress Europe' from the rest of the world,[4] but also the various restrictions on cross-border mobility introduced between them resulted in an unprecedented level of border closures *within* the European Union.[5]

3. While most of those measures were lifted towards the end of June 2020, several Member States, fearing a (at that time) potential 'second wave' of COVID-19, maintained, as a precautionary measure, restrictions on international movements. The present request for a preliminary ruling by the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium) concerns the compatibility with EU law of some of those measures, implemented by the Belgian Government at the beginning of July 2020, which consisted in a ban on 'non-essential' travel to and from, inter alia, certain countries considered to pose a high infection risk for travellers; in quarantine and testing requirements for Belgian residents upon their return from those countries; and in checks carried out at or near the Belgian borders to enforce those travel restrictions.

4. The present case is not the first concerning COVID-19 to come before the Court. Nor is it the first time that the Court has had to deal with the lawfulness of measures taken to control the spread of an epidemic disease.[6] However, so far, the Court has never been called upon to rule on the compatibility with EU law of precautionary measures which shook, by their very nature and severity, one of the main foundations, and indeed achievements, of the European Union, that is to say the creation of 'an area … without internal frontiers, in which the free movement of persons is ensured'.[7] The present case also brings to the fore the eternal issue of the balance that public authorities, in a democratic society, must strike between, on the one hand, the legitimate objective of effectively combating the threats facing society and, on the other hand, the fundamental rights of the persons affected by the measures adopted in that regard. While the Court has already had to deal with that issue, particularly in relation to the fight against crime and terrorism,[8] it will have to address it, for the first time, in the context of the threat posed by a pandemic.

3 It is true that Member States experienced different 'waves' of the pandemic at different points in time. Nevertheless, with respect to the year that is relevant in the present case, namely 2020, a rough distinction can be made between a 'first wave', from the end of February to the end of June, and a 'second wave' starting in autumn 2020 and coinciding with the emergence of new COVID-19 strains.

4 European Commission, 16 March 2020, Communication from the Commission to the European Parliament, the European Council and the Council – COVID-19: Temporary Restriction on Non-Essential Travel to the EU (COM(2020) 115 final), and European Council, Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 17 March 2020.

5 See, on the various cross-border mobility restrictions put in place by the Member States, ECDC Guidelines, pp. 18 to 20 and the references indicated.

6 See, in that respect, the case-law relating to the outbreak of 'mad cow' disease, inter alia, judgment of 5 May 1998, *United Kingdom* v *Commission* (C-180/96, EU:C:1998:192).

7 See Article 3(2) TEU and Article 26(2) TFEU.

8 See, for instance, the case-law of the Court on retention of internet traffic data, inter alia, the judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791).

II. Legal framework

A. European Union law

1. The Citizenship Directive

5. Article 4 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[9] ('the Citizenship Directive'), entitled 'Right of exit' provides, in its first paragraph, that 'without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport shall have the right to leave the territory of a Member State to travel to another Member State'.

6. Article 5 of that directive, entitled 'Right of entry', states, in its first paragraph, that 'without prejudice to the provisions on travel documents applicable to national border controls, Member States shall grant Union citizens leave to enter their territory with a valid identity card or passport and shall grant family members who are not nationals of a Member State leave to enter their territory with a valid passport'.

7. Chapter VI of the Citizenship Directive is entitled 'Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health'. Within that chapter, Article 27, entitled 'General principles', provides, in its first paragraph, that 'subject to the provisions of this Chapter, Member States may restrict the freedom of movement … of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends'.

8. In the same chapter, Article 29 of that directive, entitled 'Public health', states, in its first paragraph, that '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 [WHO] …'.

2. The Schengen Borders Code

9. Article 22 of Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)[10] ('the Schengen Borders Code'), entitled 'Crossing internal borders', states that 'internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out'.

10. Article 25 of that code, entitled 'General framework for the temporary reintroduction of border control at internal borders', provides, in its first and second paragraphs:

'1. Where, in the area without internal border control, there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally reintroduce border

[9] Directive of the European Parliament and of the Council of 29 April 2004 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).

[10] Regulation of the European Parliament and of the Council of 9 March 2016 (OJ 2016 L 77, p. 1).

control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat.

2. Border control at internal borders shall only be reintroduced as a last resort, and in accordance with Articles 27, 28 and 29. The criteria referred to, respectively, in Articles 26 and 30 shall be taken into account in each case where a decision on the reintroduction of border control at internal borders is considered pursuant, respectively, to Article 27, 28 or 29.'

B. Belgian law

11. As part of a series of 'urgent measures' to limit the spread of COVID-19 on the territory of Belgium, the Belgian Government put in place travel restrictions. However, the rules applicable in that regard changed over time. Those developments, in terms of what is relevant for the purposes of the present case, may be summarised as follows.

12. *Initially*, between 23 March and 15 June 2020, all 'non-essential' travel from and to Belgium was, in principle, prohibited.[11] *Then*, between 15 June and 12 July 2020, an exception to that ban applied with respect to the 'EU+ countries'.[12] Travel to and from one of those countries was permitted, provided that the country in question allowed it.[13] *Finally*, the Belgian Government decided that 'non-essential' travel between Belgium and the countries in question would be regulated on the basis of the epidemiological situation of each State.

13. To that effect, Article 18 of the Ministerial Decree of 30 June 2020 on urgent measures to limit the spread of the coronavirus COVID-19, as amended by the Ministerieel besluit van 10 juli 2020 (Ministerial Decree of 10 July 2020) (*Moniteur Belge* of 10 July 2020, p. 51609) (together 'the contested decree') was implemented. That provision stated:

'§1 Non-essential travel to and from Belgium is prohibited.

§2 By way of derogation from the first paragraph …, it is authorised:

1° to travel from Belgium to all countries of the European Union, the Schengen area and the United Kingdom, and to travel to Belgium from these countries, with the exception of territories designated as red zones, the list of which is published on the website of [the Belgian Foreign Ministry];

…'

11 See Article 7 of the Ministerieel besluit van 20 maart 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken (Ministerial Decree of 23 March 2020 on emergency measures to limit the spread of the COVID-19 coronavirus) (*Moniteur Belge* of 23 March 2020, p. 17603).

12 This expression refers to the Member States of the European Union and the third countries that implement the Schengen *acquis*, namely Iceland, Liechtenstein, Norway and Switzerland.

13 See Article 7 of the Ministerial Decree of 23 March 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, as amended by the Ministerial Decree of 5 June 2020 (*Moniteur Belge* of 5 June 2020, p. 41544) and, then, Article 18 of the Ministerieel Besluit van 30 juni 2020 houdende dringende maatregelen om de verspreiding van het coronavirus COVID-19 te beperken (Ministerial Decree of 30 June 2020 on urgent measures to limit the spread of the coronavirus COVID-19) (*Moniteur Belge* of 30 June 2020, p. 48715).

14. Accordingly, as of 12 July 2020, and until a date not specified in the order for reference, a colour classification, dividing EU+ countries into 'red', 'orange' and 'green' according to their epidemiological situation, was used by the Belgian authorities. Pursuant to that classification:

– 'Green' meant that travel to the country concerned was allowed without any restrictions;

– 'Orange' meant that travel to the country concerned was advised against and that quarantine and a test on return were requested, but not mandatory;

– 'Red' meant that travel to the country concerned was prohibited and that travellers had to undergo quarantine and mandatory testing on their return (as provided for in the rules of the relevant Belgium region). [14]

15. For the purposes of the colour classification referred to above, the assessment of the epidemiological situation of each country or region was carried out pursuant to a methodology set out in a written opinion issued by an advisory body of the Belgian Government. [15] The key criteria used were, first, the cumulative number of new infections ('incidence') in the previous 14 days per 100 000 inhabitants at national or regional level (if sub-national data were available), secondly, the trend in the infection rates and, thirdly, the possible containment measures imposed at national or regional level. Accordingly, countries were classified as:

– 'high risk' (that is to say 'red') where the national incidence of new cases of COVID-19 within the previous 14 days was more than 10 times higher than that of Belgium (100 reported cases per 100 000 inhabitants). That also applied to the areas within a country where lockdown or more restrictive measures than were applicable in the rest of the territory had been imposed;

– 'moderate risk' (that is to say 'orange') where the national incidence of new cases of COVID-19 within the previous 14 days was between 2 and 10 times higher than that of Belgium (between 20 and 100 reported cases per 100 000 inhabitants);

– 'low risk' (that is to say 'green') countries, those where the national incidence of new cases of COVID-19 within the previous 14 days was similar to that of Belgium (less than 20 reported cases per 100 000 inhabitants).

16. Data on infection rate in every country or region (where available) were provided by the ECDC, which itself received those data from the countries concerned. Information on the possible containment measures applying in a given country or region was obtained and provided by the Belgian Foreign Ministry. Celeval was to transmit the information related to the colour classification of countries at least once a week.

17. Article 22 of the contested decree also provided that infringements of the provisions of, in particular, Article 18 of that decree would result in the imposition of the penalties provided for in Article 187 of the Law of 15 May 2007 relating to civil security. [16] That provision states, in essence, that refusal or negligence to comply with such measures is punishable, in peacetime, by a term of

[14] The order for reference does not explain the legal basis for the quarantine and testing requirements imposed on return. Before the Court, the Belgian Government explained that quarantine and testing requirements fell within the competence not of the federal State, but of federated entities. Accordingly, various regulations were applicable in that respect in different parts of Belgium.

[15] Namely the Celeval, a body created by the Belgian Government in April 2020, chaired by the Federal Public Health Service and composed of health experts, virologists, economists, psychologists, behavioural and communication experts.

[16] *Moniteur Belge* of 31 July 2007.

imprisonment of eight days to three months and a fine of EUR 26 to EUR 500, or by one of those penalties only. It further states that the Minister of the Interior or, where applicable, the mayor or the police commander for the area in question 'may, in addition, have the said measures carried out *ex officio*', at the expense of the offenders.

III. Facts, national proceedings and the questions referred for a preliminary ruling

18. NORDIC INFO BV ('Nordic Info') is a tour operator, established in Belgium, which organises and sells trips to the Nordic countries, in particular Sweden.

19. On 12 July 2020, the colour classification of EU+ countries referred to in Article 18(2)(1°) of the contested decree was published, for the first time, on the website of the Belgian Foreign Ministry. Sweden was classified as 'red' on the basis of its epidemiological situation. Whereas Belgium had not applied any travel restrictions in relation to that country since 15 June 2020,[17] as a result of that classification, 'non-essential' travel to and from Sweden was prohibited under that provision. Furthermore, quarantine and testing requirements became mandatory for Belgian residents upon their return from that country, pursuant to the applicable regional regulations.

20. Subsequently, Nordic Info cancelled all scheduled trips to Sweden for the 2020 summer season, informed the travellers present in that country at the time of the situation, and provided them with assistance to return to Belgium.

21. On 15 July 2020, the colour classification of EU+ countries was updated on the website of the Belgian Foreign Ministry. The colour code of Sweden changed from 'red' to 'orange'. Accordingly, 'non essential' travel to that country was no longer prohibited, but simply not recommended, and quarantine and screening tests were no longer imposed on residents upon their return.

22. Nordic Info subsequently brought a civil liability action against the Belgische Staat (Belgian State) before the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking)), seeking damages in the provisional amount of EUR 481 431.00, plus interest, and requesting the appointment of an expert for the evaluation of the definitive loss it suffered as a result of the cancellation of the planned trips to Sweden.[18]

23. Nordic Info claims, in essence, that the Belgian Government erred in law when adopting the travel restrictions in question. In particular, the applicant in the main proceedings argues, first, that those measures were contrary to the Citizenship Directive, as they limited the right to free movement guaranteed therein and no legal basis allowed for such a derogation. Secondly, those measures entailed, in practice, the reintroduction of border control at the borders that Belgium shares with other Member States, in breach of the conditions laid down, in that respect, in the Schengen Borders Code.

[17] See point 12 above. It is undisputed that Sweden did not impose restrictions on entry to Belgian residents at the material time.

[18] Nordic Info claims damages, specifically, for the loss associated with the cancellation of all trips to Sweden, providing information to the travellers concerned and assistance for return, together with the impossibility of making future bookings because of the travel ban. However, the referring court specifies that, at this stage of the main proceedings, Nordic Info 'does not exclude any head of damages', which, if I understand it correctly, means that it may rely on other losses at a later stage. I will come back to that aspect in point 36 below.

24. It is in those circumstances that the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking)) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Articles 2, 4, 5, 27 and 29 of [the Citizenship Directive], which implement Articles 20 and 21 TFEU, be interpreted as not precluding the regulations of a Member State (in the present case, deriving from Articles 18 and 22 of [the contested decree]) which by way of a general measure:

– impose, in principle, on Belgian nationals and their family members as well as on Union citizens residing in Belgian territory and their family members an exit ban for non-essential travel from Belgium to countries within the [European Union] and the Schengen Area that are coloured red in accordance with a colour code drawn up on the basis of epidemiological data;

– impose on non-Belgian Union citizens and their family members (who may or may not have the right to reside in Belgian territory) entry restrictions (such as quarantines and tests) for non-essential travel from countries within the [European Union] and the Schengen Area to Belgium which are coloured red in accordance with a colour code drawn up on the basis of epidemiological data?

(2) Must Articles 1, 3 and 22 of the Schengen Borders Code be interpreted as not precluding the regulations of a Member State (in the present case, Articles 18 and 22 of [the contested decree]) which impose an exit ban on non-essential travel from Belgium to countries within the EU and the Schengen Area and an entry ban from those countries to Belgium which may not only be checked and sanctioned, but may also be enforced *ex officio* by the Minister, the mayor and the police commander?'

25. The present request for a preliminary ruling, dated 7 February 2022, was lodged on 23 February 2022. Written observations have been submitted by Nordic Info, the Belgian, Romanian, Norwegian and Swiss Governments, as well as the European Commission. The Belgian, Romanian and Norwegian Governments, together with the Commission, were represented at the hearing that took place on 10 January 2023.

IV. Analysis

26. The present case revolves around the compatibility with EU law of two related, yet distinct, sets of measures implemented by the Belgian Government in July 2020[19] to control the spread of COVID-19. In the first place, the case concerns certain travel restrictions, namely, first, a ban on 'non-essential' travel, prohibiting travellers from leaving the Belgian territory in order to travel to countries considered to pose a high infection risk as well as – with the exception of Belgian nationals and residents – entering that territory from those countries, and, secondly, quarantine and screening test requirements imposed on those nationals and residents[20] upon return their

[19] The order for reference does not specify how long those measures were in force.

[20] I emphasise that, contrary to what the wording of the first question seems to indicate, it is clear from the order for reference that those requirements applied not only to nationals of other Member States that reside in Belgium, but also to Belgian nationals. The referring court explains, in that regard, that that question reflects not their actual scope, but rather the fact that Nordic Info challenges the compatibility with EU law of those measures only to the extent that they applied to nationals of other Member States.

from the countries in question. In the second place, the case relates to the carrying out of checks on persons who crossed or attempted to cross the Belgian borders, in order to enforce those travel restrictions.

27. Such measures are governed by different rules under EU law. On the one hand, travel restrictions, to the extent that they apply to nationals of the Member States [21] wishing to travel within the European Union, fall within the scope of various provisions of primary and secondary EU law which guarantee to those nationals the right to freedom of movement. This is at the heart of the *first question* referred. On the other hand, border checks are not covered by the provisions mentioned above. [22] With respect to the Member States in relation to which the Schengen *acquis* applies, such as Belgium, [23] the legality of these checks must be considered on the basis of the provisions of the Schengen Borders Code. That is at the heart of the *second question* of the national court.

28. I will address both questions in turn in the following sections.

A. The compatibility of the contested travel restrictions with the rules on the free movement of persons (first question)

29. For the purpose of the assessment of the contested travel restrictions, and in the light of the debate that took place before the Court, I consider it useful to address a number of issues, namely, the relevant free movement rules (1), their territorial scope (2), the extent to which those restrictions hindered the exercise of the rights guaranteed therein (3), whether Member States could derogate from EU law, to an 'exceptional' degree, under the circumstances at issue (4) and, finally, the legality of those restrictions in the view of those rules (5).

1. The relevant rules on the free movement of persons

30. Travel restrictions such as those adopted by Belgium are measures of general application that have affected many people. The persons concerned may have had different a legal status, for example, nationals of the Member States or third-country nationals with a right of residence in Belgium. Those persons may have sought to travel to, or arrive from, different places – another EU Member State or a third country – and for different purposes – work, family, leisure, and so on. Depending on those variables, the same travel restrictions could be assessed in the light of different provisions of national law, EU law, and international law governing the cross-border movement of persons.

31. However, in the context of the present request for a preliminary ruling, it is not for the Court to engage in a holistic review of the legality of such measures. Instead, its task is to provide an interpretation of EU law that will be useful to the referring court in settling the dispute in the main proceedings, in the light of the factual situation at issue before it.

[21] As well as members of their families who are third-country nationals. In the rest of this Opinion, for the sake of simplicity, I will focus on nationals of the Member States, but the analysis will be just as valid for those third-country nationals.

[22] Indeed, while the free movement rules grant nationals of the Member States a right to move between these States, they do not grant them the right not to be subjected to border checks when doing so. See, to that effect, recital 7 and Articles 4 and 5 of the Citizenship Directive.

[23] See Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union (OJ 2010 C 83, p. 290), annexed to the Treaty of Lisbon, Articles 1 and 2.

32. The present case is a little unusual in that respect. Indeed, the legality of the relevant travel restrictions is not being challenged by a given individual who was prevented from travelling to or from a given destination. Rather, it is a civil liability claim brought by a company that, as a Belgian tour operator organising trips, in particular, to Sweden, was indirectly affected by those restrictions. That said, before the national court, Nordic Info is not availing itself of its own freedom to provide cross-border tourism services, as protected under various provisions of EU law.[24] Instead, it relies on the right to freedom of movement that its actual and potential clients – who are presumed to be nationals of the Member States – enjoy under EU law. Thus, the Court should limit itself, in the present case, to examining, essentially, the rules related to that right.

33. I note that, under Article 20(1) TFEU, nationals of the Member States have the status of Union citizens. That status confers on them, pursuant to Article 20(2)(a) and Article 21(1) of that treaty and Article 45(1) of the Charter of Fundamental Rights of the European Union ('the Charter'),[25] inter alia, a right to move freely within the territory of the Member States, irrespective of the purpose, tourism included. That right is to be exercised in accordance with the conditions laid down in the secondary law instruments adopted to give it effect,[26] in particular, the Citizenship Directive.[27]

34. The right to free movement guaranteed to Union citizens has two components. It implies, first, a right of exit, expressed in Article 4 of the Citizenship Directive. That is the right of all Union citizens to leave the territory of any Member State, including their own,[28] in order to travel to another Member State,[29] under the sole condition that they are in possession of a valid identity card or passport and, I repeat, irrespective of the purpose of the exit.[30] Therefore, the situation of Belgian nationals and other Union citizens, who sought to leave the Belgian territory to travel to Sweden for a holiday, is covered by that right.[31]

35. That right to free movement implies, secondly, a right of entry, although, in that respect, the legal framework is slightly more complicated. In essence, on the one hand, Article 5(1) of the Citizenship Directive grants nationals of a Member State the right to enter the territory of *another* Member State, under the sole condition that they are in possession of a valid identity card or passport and, here again, irrespective of the purpose of the entry. On the other hand, that

24 See, in particular, Article 56 TFEU.

25 In addition, the right, for nationals of the Member States, to travel within the European Union for the specific purpose of tourism is protected under the freedom to provide services laid down, inter alia, in Article 56 TFEU. See, notably, judgment of 31 January 1984, *Luisi and Carbone* (286/82 and 26/83, EU:C:1984:35, paragraph 16).

26 See Article 20(2) and Article 21(1) TFEU and Article 52(2) of the Charter.

27 See Article 1(a) of the Citizenship Directive.

28 See, in particular, judgment of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraphs 30 and 32 and the case-law cited).

29 Conversely, the possibility for Union citizens to leave a Member State in order to travel to a third country is not covered by that provision, nor by EU law on free movement in general.

30 See, to that effect, recitals 2 and 3 of the Citizenship Directive.

31 In international law, the right to leave any country, including one's own, is guaranteed, notably, in Article 2(2) of Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950. As all the Member States, apart from Greece, have ratified that protocol, it is a relevant element of context for the analysis in the present case.

provision does not govern the entry of Union citizens into their *own* Member State.[32] That said, first, the right of a person to enter the territory of the State of which he or she is a national flows/arises from a well-established principle of international law, reaffirmed, inter alia, in Article 3(2) of Protocol No 4 to the ECHR.[33] Secondly, pursuant to the settled case-law of the Court, Article 21(1) TFEU applies to the specific situation of a Union citizen returning to his or her own Member State after having exercised the right to free movement by travelling abroad.[34] All in all, in this case, Belgian nationals and other Union citizens benefited from a right to enter the Belgian territory after, for example, a tourist trip to Sweden – although pursuant to different legal bases.

2. Whether those rules apply in relation to the movement of persons between Belgium and Iceland or Norway

36. At this stage of this Opinion, I wish to address an issue which, although secondary, nevertheless formed a significant part of the debate before the Court. Specifically, it follows from the order for reference that Nordic Info routinely organises trips not only to Sweden, but also to Iceland and Norway. While those countries are not in the European Union, they are part of the Schengen Area.[35] Accordingly, the contested travel restrictions applied, with respect to them, in the same way that they did with respect to the Member States.[36] In that context, the national court indicates that, although the liability claim introduced by Nordic Info centres on the loss it suffered in relation to the cancellation of trips to Sweden, that company 'does not exclude any head of damages'. That court thus seems to indicate that the applicant may, at a later stage in the main proceedings, revise, or at least specify its claim to include the possible cancellation of trips to Iceland and/or Norway. Hence the national court referred, in its first question, to Union citizens wishing to travel from Belgium to certain 'countries within the [European Union] and the Schengen Area' (and vice-versa).

37. In the light of the foregoing, the Court questioned the interveners, during the hearing, on the issue of whether and, if so, to what extent, the rules on the free movement of persons laid down in the Citizenship Directive apply in relation to Iceland and Norway.

32 That solution stems from the delimitation of the general scope of the Citizenship Directive, which, pursuant to its Article 3(1), applies 'to all Union citizens who move to or reside in a Member State other than that of which they are a national' (see, inter alia, judgment of 6 October 2021, *A (Crossing of borders in a pleasure boat)* (C-35/20, EU:C:2021:813, paragraphs 67 to 69 and the case-law cited)). During the hearing, the Court asked the interveners whether, consequently, Article 4(1) of that directive does not govern either the *exit*, from the Belgian territory, of a Swedish national who seeks to travel to Sweden. In my view, it does. First, from a logical point of view, it does not follow from the fact that the Citizenship Directive does not address the particular issue of the *entry* of a Swedish national into Sweden that it also does not govern the issue of the *exit* of that national from Belgium – for these are two related, yet distinct, questions. Secondly, when a Swedish national resides in Belgium, he or she is a 'Union citizen who … reside[s] in a Member State other than that of which [he or she] [is] a national', within the meaning of Article 3(1) of that directive. That person is, accordingly, a 'beneficiary' of the right conferred by that instrument. Article 4(1) of that directive therefore applies to the issue of whether Belgium may or may not prohibit that person from leaving its territory, regardless of the destination.

33 By contrast, no general right, for an alien, to enter in a particular country is guaranteed as such in international law. See, regarding the ECHR, European Court of Human Rights (ECtHR), 26 June 2012, *Kurić and Others v. Slovenia* (CE:ECHR:2014:0312JUD002682806, § 355).

34 See, to that effect, inter alia, judgment of 6 October 2021, *A (Crossing of borders in a pleasure boat)* (C-35/20, EU:C:2021:813, paragraph 70 and the case-law cited). Article 56 TFEU could also, in my view, be invoked by Union citizens against their own Member State, in the context of their return from a tourist trip to another Member State (see footnote 26 above).

35 See Article 2 of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the latters' association with the implementation, application and development of the Schengen *acquis* of 18 May 1999 (OJ 1999 L 176, p. 36).

36 See points 12 and 13 above.

38. Together with the Belgian and Romanian Governments, I am not convinced that the Court should address that issue in its subsequent judgment in the present case. Besides the fact that the national court does not seek clarification on that matter – as it seems convinced of the answer [37] – it is uncertain whether providing such clarification *ex officio* would be of use to that court in adjudicating the case before it. Indeed, the Court would essentially be issuing an advisory opinion on what is, at this stage of the main proceedings, very much a hypothetical issue, [38] in order to account for the possibility that it might become relevant later *if* Nordic Info amends or specifies its claim. The Court normally refuses, and rightly so, to follow such a speculative approach in the context of the preliminary ruling procedure. [39]

39. Should the Court nonetheless decide to rule on the issue, I will make the following remarks in the alternative.

40. Generally speaking, the rules on the free movement of persons laid down in the FEU Treaty and the secondary law instruments adopted to give them effect govern, as I have already stated, the situation of Union citizens travelling between Member States, not the movement of persons between a Member State, such as Belgium, and a third country such as Iceland or Norway. The fact that those last countries are part of the Schengen Area is irrelevant in that regard since those rules are not part of the Schengen *acquis*.

41. However, Iceland and Norway are also parties to the Agreement on the European Economic Area [40] ('the EEA Agreement'), together with all the Member States of the European Union and the Union itself. That agreement includes, in its annexes, [41] two express references to the Citizenship Directive, since the entry into force of the Decision of the EEA Joint Committee No 158/2007 of 7 December 2007 [42] ('the Joint Committee Decision'). Through those references, that directive has been incorporated into EEA law, with some minor adaptations, [43] and is, accordingly, binding upon the Contracting Parties to that agreement. [44]

42. That said, given that the annexes in question are dedicated, respectively, to the free movement of workers and the right of establishment, and that they each indicate that the Citizenship Directive 'shall apply, as appropriate, to the fields covered by [the annex in question]', it remains to be clarified whether that directive has been integrated in the EEA Agreement only *in part*, solely in relation to the movement of nationals of the EU Member States and the EFTA States within the European Economic Area (EEA) for the specific purposes of employment and self-employment respectively, or *fully*, so that it regulates that movement for *any* purpose, as it does in the European Union. [45] In that context, the question of whether non-economically active

37 The referring court indicates, in the order for reference, that it considers that the Citizenship Directive regulates the movement of persons between, inter alia, Belgium and Iceland or Norway.

38 The classification of those countries under the colour classification at issue in the main proceedings is not mentioned in the order for reference, which means that it is not even clear that travel restrictions applied in relation to them at the material time.

39 See, for instance, judgments of 11 December 2018, *Weiss and Others* (C-493/17, EU:C:2018:1000, paragraph 166), and of 26 November 2020, *Sögård Fastigheter* (C-787/18, EU:C:2020:964, paragraphs 79 to 81).

40 Agreement of 2 May 1992 (OJ 1994 L 1, p. 3).

41 More specifically in Annex V, point 1, and Annex VIII, point 3.

42 OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, p. 17.

43 In EEA law, any reference, in the Citizenship Directive, to 'Member State(s)' is to be understood as including, in addition, the EFTA States (Iceland, Liechtenstein and Norway) and any reference to 'Union Citizen(s)' is replaced by the words 'national(s) of EC Member States and EFTA States' (see Annex V and Annex VIII to the EEA Agreement).

44 See, to that effect, Article 7 of the EEA Agreement.

45 See points 34 and 35 above.

persons – that is to say persons such as students, retired persons, and so on, who are neither employed nor self-employed – benefit, within the EEA, from the right to free movement guaranteed by that directive, has been particularly debated before the Court.

43. Indeed, whereas the EEA Agreement contains, like the FEU Treaty, provisions ensuring the free movement of persons for economic purposes,[46] it does not contain any provisions similar to Articles 20 and 21 TFEU, which govern the movement within the European Union of those non-economically active citizens. In fact, the entire concept of 'Union citizenship' has no equivalent in that agreement.[47]

44. While the Court has not yet ruled on the matter,[48] the EFTA Court has already done so. In its judgment in *Gunnarsson*,[49] that court held that the Citizenship Directive does apply to the movement of non-economically active persons within the EEA, irrespective of the absence, in the EEA Agreement, of a provision equivalent to Articles 20 and 21 TFEU. In essence, the EFTA Court recalled that the right to free movement for non-economically active persons was already guaranteed under EU and EEA law, before the introduction of the concept of 'Union citizenship' and those provisions, in various directives,[50] incorporated from the beginning in that agreement. The Citizenship Directive repealed and replaced those directives, and the Joint Committee Decision transposed that development into EEA law. Although the movement of 'non-economically active' persons is now linked, under EU law, to the concept of 'Union citizenship', and although the latter has no equivalent in EEA law, it does not mean, according to the EFTA Court, that individuals should be 'deprived of rights that they have already acquired' under that agreement before the introduction of that concept and which 'have been maintained' in that directive.[51]

45. Evidently, the Court is not bound by the decisions of the EFTA Court. Nonetheless, in my opinion, the general international law principle of respect for contractual commitments (*pacta sunt servanda*),[52] the 'special relationship between the European Union, its Member States and the EFTA States',[53] and the necessity to ensure, as far as possible, the uniform application of the EEA Agreement in all Contracting Parties, mean that the Court must take those decisions into account for the purpose of interpreting that agreement.[54] In fact, I would suggest that it should follow them, unless there are compelling reasons not to do so.

46 See, in particular, Article 28 (free movement of workers) and Article 31 (right of establishment) of the EEA Agreement. On a related note, the Commission recalled, during the hearing, that the freedom to provide services guaranteed in Article 36 of that agreement grants nationals of the EU Member States and of the EFTA States a right to travel within the EEA for the purpose of tourism (see judgment of 2 April 2020, *Ruska Federacija* (C-897/19 PPU, EU:C:2020:262, paragraphs 51 to 54), as Article 56 TFEU does within the European Union (see footnote 26 above), and that is so, irrespective of the economic status of those nationals. Therefore, in the present case, irrespective of the extent to which the Citizenship Directive applies within the EEA, the clients of Nordic Info had a guaranteed right, under EEA law, to travel from Belgium to Iceland or Norway (and vice versa). That fact reinforces my conviction that there is no need to rule on that issue in the present case.

47 See Joint Committee Decision, recital 8. See also Joint Declaration by the Contracting Parties to [that decision].

48 I emphasise that the Court has jurisdiction to interpret the EEA Agreement. Indeed, since it has been concluded by, inter alia, the European Union, it is an integral part of EU law. See judgment of 2 April 2020, *Ruska Federacija* (C-897/19 PPU, EU:C:2020:262, paragraph 49).

49 Judgment of 27 June 2014 (E-26/13, [2014] EFTA Ct. Rep. 254) ('the judgment in *Gunnarsson*').

50 See Council Directives 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26); 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28); and 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30). Those directives had been adopted, back then, on the basis of the 'flexibility clause' laid down in Article 235 TEC (now Article 352 TFEU).

51 See the judgment in *Gunnarsson* (paragraphs 75 to 82).

52 As laid down in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*United Nations Treaty Series*, Vol. 1155, p. 331).

53 See, inter alia, judgment of 2 April 2020, *Ruska Federacija* (C-897/19 PPU, EU:C:2020:262, paragraph 50 and the case-law cited).

54 See, by analogy, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraph 92).

46. That caveat does not apply here, in my view. Indeed, the reasoning of the EFTA Court in its judgment in *Gunnarsson* is cogent. The fact that 'EEA citizenship' does not exist in EEA law does not warrant narrowing down the material scope of a directive which was incorporated as such in the EEA Agreement. After all, certain provisions of the Citizenship Directive are addressed specifically to non-economically active persons.[55] Had it been the intention of the Joint Committee to exclude those persons from the scope of that directive in EEA law, it could easily have included an express reservation to those provisions. Yet, no such reservation appears in the Joint Committee Decision. Accordingly, only those rights which have no legal basis in the directive itself, and which stem solely from Articles 20 and 21 TFEU, are not applicable within the EEA, due to the lack of an equivalent provision in the EEA Agreement.[56]

47. In summary, the rules of the Citizenship Directive also govern, in my view, the movement of nationals of the EU Member States and of the EFTA States within the EEA, for whatever purpose. Accordingly, those persons enjoy, under the conditions specified in that directive, a right to move freely between, inter alia, Belgium and Iceland or Norway, inter alia for tourism.[57]

3. The contested travel restrictions hindered the exercise of the right to freedom of movement guaranteed by those rules

48. It is undisputed that travel restrictions such as those at issue in the main proceedings hindered the exercise, by Union citizens, of their right to freedom of movement.

49. First, to the extent that it applied to Union citizens seeking to leave the Belgian territory to travel to the Member States classified as 'red' under the colour classification at issue, the ban on 'non-essential' travel restricted, drastically, the right of exit guaranteed, inter alia, in Article 4(1) of the Citizenship Directive. That is true regardless of the fact that travel to other Member States (namely those classified as 'green' or 'yellow') remained, by contrast, unrestricted. It is sufficient, in my view, that those persons could not freely travel to the State of their choice.[58] With respect to the 'red' Member States, the possibility for Union citizens to exercise the right of exit was hindered significantly. In fact, that right was *denied* in respect of many reasons for travel, including tourism. In addition, to the extent that it applied to Union citizens – apart from Belgian

55 See, notably, Article 7(1)(b) of the Citizenship Directive.

56 In my view, the reasoning of the EFTA Court in point 80 of its judgment in *Gunnarsson*, pursuant to which, on the one hand, the incorporation of the Citizenship Directive in the EEA Agreement cannot have introduced into that agreement 'rights based on the concept of Union Citizenship', while, on the other hand, individuals should be able to avail themselves of the 'established rights' that have been 'maintained' in that directive, can be read that way. That said, the Court asked the interveners, during the hearing, whether this reasoning should, instead, be understood in the sense that only some of the rights guaranteed in that directive, considered to be 'established', should benefit non-economically active persons in the EEA, while others, such as the right of short-term residence (Article 6) and the right of permanent residence (Articles 16 to 21) should not, on the ground that those are 'new' rights, 'based on the concept of Union Citizenship'. Together with all the interveners, I do not think that such a restrictive interpretation is called for. I repeat: no reservation to that effect is contained in the Joint Committee Decision. Surely, for the EFTA Court, it was enough that, the 'rights' to free movement and residence, *broadly speaking*, had already been 'established' for non-economically active persons under the former directives, even if the detailed 'sub-rights' stemming from them evolved in the Citizenship Directive.

57 For the sake of simplicity, I will continue, in the rest of this Opinion, to refer to Union citizens travelling within the European Union only. The reasoning will be valid, *mutatis mutandis*, for the scenario of movement of EU citizens and nationals of the EFTA States within the EEA.

58 See, by analogy, ECtHR, 14 June 2022, *L.B. v. Lithuania*, (CE:ECHR:2022:0614JUD003812120, § 81).

nationals[59] and nationals of other Member States residing in Belgium[60] – seeking to enter the Belgian territory from a 'red' Member State, the contested travel ban restricted, just as severely, the right of entry guaranteed, inter alia, in Article 5(1) of that directive, on similar grounds.

50. Secondly, to the extent that they applied to non-Belgian Union citizens residing in Belgium upon their return from a 'non-essential' trip to a 'red' Member State, the quarantine and screening test requirements also restricted the right of entry laid down in Article 5(1) of the Citizenship Directive. Notably, the obligation to quarantine drastically limited the possibility of moving within the Belgian territory, which had, in my view, an equivalent effect to delaying entry thereon. To the extent that they applied to Belgian nationals in the same circumstances, those requirements, while falling outside the scope of the principle reaffirmed in Article 3(2) of Protocol No 4 to the ECHR,[61] restricted, in my view, the right to free movement, as guaranteed under Article 21 TFEU, for similar reasons.

4. An 'exceptional' possibility of derogating from EU law under Article 347 TFEU?

51. In view of some of the arguments put forward by the interveners before the Court, I wish to address, at this stage of the present Opinion, an important consideration regarding the possibility, for Member States, of derogating from EU law during the COVID-19 pandemic.

52. Indeed, those interveners submit that the pandemic constituted, at least in its first months, a 'crisis', that required urgent intervention by the public authorities. I observe, in that respect, that several Member States declared, at one point or another during the pandemic, a 'state of emergency', which entailed the temporary suspension of or derogation from ordinary laws on their territories in order to implement the urgent measures deemed necessary to respond to that 'crisis'. In fact, many of these measures – especially the generalised lockdowns – echoed those applicable in wartime.

53. This raises the question of whether an 'exceptional' legal framework should be applied to assess the contested measures, instead of the 'ordinary' EU rules and their 'ordinary' exceptions. In that respect, I recall that Article 347 TFEU provides a 'safeguard clause', which recognises, in essence, that Member States may adopt the measures that they consider necessary, inter alia, in the event of 'serious internal disturbances affecting the maintenance of law and order'.[62] That provision, which has never been interpreted by the Court, could theoretically allow for a general derogation from all the rules of this Treaty and those adopted on its basis, including the various provisions on the free movement of persons, in such circumstances.[63] Needless to say, the

[59] Indeed, pursuant to the principle of international law reaffirmed in Article 3(2) of Protocol No 4 to the ECHR, a State is *precluded* from refusing entry on its territory to its own nationals.

[60] Which may be explained by the fact that Article 29(2) of the Citizenship Directive does not allow a Member State to refuse, on 'public health' grounds, the entry of nationals of other Member States who reside on its territory (see point 60 below).

[61] Indeed, that provision has, in my view, a narrower scope than Article 5(1) of the Citizenship Directive or Article 21(1) TFEU, as it is confined to prohibiting *ex lege* or de facto *deprivation* of the right to enter the national territory. Temporary measures such as quarantine cannot be regarded as such. See ECtHR, 14 September 2022, *H.F. and Others v. France*, (CE:ECHR:2022:0914JUD002438419, §§ 128 and 248).

[62] See, by analogy, Article 123(c) of the EEA Agreement.

[63] See my Opinion in *Valstybės sienos apsaugos tarnyba and Others* (C-72/22 PPU, EU:C:2022:431, point 112 and the references cited). With respect to Article 2(2) of Protocol No 4 to the ECHR, I recall that, similarly, Article 15(1) of that convention allows Member States, in time of 'public emergency threatening the life of the nation' to 'take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.

questions of whether and, if so, to what extent, the COVID-19 pandemic could be regarded as having caused such 'serious internal disturbances' in the Member States,[64] as well as of the other potential conditions and limits attached to that 'safeguard clause', are extremely sensitive.

54. That said, besides the fact that the Belgian Government has not invoked Article 347 TFEU,[65] before the Court or elsewhere, it would, in any event, only be necessary to rule on that provision if national measures such as those at issue in the main proceedings could not be justified under the 'ordinary' EU rules and their 'ordinary' exceptions.[66] However, as I will explain in the rest of this Opinion, those rules are flexible enough to accommodate the peculiarity of the situation in question.

5. The lawfulness of the contested travel restrictions in the light of the derogation clauses provided for in the Citizenship Directive

55. Even under 'ordinary' EU law, the right to freedom of movement enjoyed by Union citizens is not absolute. Restrictions are permissible.[67] However, in order to be compatible with EU law, any restriction must respect, in particular, the conditions set out therein. To the extent that the contested travel restrictions fall within the scope of the Citizenship Directive, they must be assessed under the conditions laid down in Chapter VI of that instrument. Furthermore, to the extent that those restrictions applied to Belgian nationals returning to Belgium, having exercised their right to free movement, I recall that while that situation is covered not by the Citizenship Directive, but by Article 21 TFEU, the conditions for derogation provided for by that directive apply *by analogy*.[68]

56. As an introduction to Chapter VI, Article 27(1) of the Citizenship Directive contains the general rule that Member States are allowed to restrict 'freedom of movement' of Union citizens on grounds of 'public policy', 'public security' or 'public health'. That general rule is specified in the rest of that chapter. In particular, Article 29(1) of that directive frames the possibility for Member States to restrict that 'freedom' on grounds of 'public health'. With regard to the legality of national measures adopted on such grounds, those two provisions must therefore be read in conjunction. Together, they impose a series of conditions, which will be explained in more detail below, and must be respected in every case.[69]

64 I would limit myself to observing that, under the case-law of the ECtHR, the concept of 'public emergency threatening the life of the nation' within the meaning of Article 15 ECHR refers to 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed' (see ECtHR, 1 July 1961, *Lawless v. Ireland (No. 3)* (CE:ECHR:1961:0701JUD000033257, § 28). The ECtHR has not yet ruled on whether the COVID-19 pandemic falls within that definition. However, in its decision of 13 April 2021, *Terheş v. Romania* (CE:ECHR:2021:0413DEC00499332, § 39) ('the judgment in *Terheş v. Romania*'), it hinted that might be the case, at least during its first months (see § 39). In my Opinion in *Valstybės sienos apsaugos tarnyba and Others* (C-72/22 PPU, EU:C:2022:431, points 110 to 113), I suggested a similar definition of the concept of 'serious internal disturbances' used in Article 347 TFEU. In my view, the situation in certain Member States at the height of the first wave could be characterised as such 'disturbances'. That characterisation would seem more far-fetched in relation to the situation in other Member States at the material time (see points 80 to 85 below).

65 To my knowledge, no Member State invoked Article 347 TFEU during the COVID-19 pandemic. As regards Article 15(1) ECHR, Belgium is not among the States which issued, during that pandemic, notifications under Article 15(3) (list of notifications available at https://www.coe.int/en/web/conventions/derogations-covid-19).

66 See, by analogy, ECtHR, judgment in *Terheş v. Romania* (§ 46 and the case-law cited).

67 See, to that effect, Article 20 and Article 21(1) TFEU. See also, with respect to Article 45 of the Charter, Article 52(1) of that instrument.

68 See, *mutatis mutandis*, judgment of 5 June 2018, *Coman and Others* (C-673/16, EU:C:2018:385, paragraph 25 and the case-law cited).

69 See point 75 et seq. I emphasise that, as opposed to the 'public policy' or 'public security' exceptions, the 'public health' exception has, so far, never been interpreted by the Court.

57. While the Belgian Government relies on Article 27(1) and Article 29(1) of the Citizenship Directive before both the referring court and this Court, Nordic Info submits that, irrespective of whether the conditions laid down therein are fulfilled, those provisions cannot cover travel restrictions such as those at issue in the main proceedings. This calls for an abstract discussion on the scope of those provisions (a), before carrying out a specific assessment of those measures in the light of the conditions at issue (b).

(a) The scope of Article 27(1) and Article 29(1) of the Citizenship Directive

58. In Nordic Info's view, Article 27(1) and Article 29(1) of the Citizenship Directive are, generally speaking, not broad enough to cover – in whole or, at least, in part – travel restrictions such as those at issue because those provisions permit restrictions solely to the right of entry, not the right of exit (1) and, in any case, allow for 'individual' restrictions to free movement only, not 'general' restrictions (2). I will address those objections in turn in the following sections.

(1) The possibility of restricting both the right of entry and the right of exit

59. I recall that Article 27(1), read in conjunction with Article 29(1), of the Citizenship Directive allows Member States to restrict 'freedom of movement' on public health grounds, without further specification as to the type of measures that may be taken by national authorities.

60. In the first place, those terms cover possible restrictions to the right of entry laid down in Article 5(1) of the Citizenship Directive. That includes, on the one hand, a possible ban on entry on a Member State's territory. Caveats apply, however. That provision may never be used by a Member State to refuse entry on its territory to its own nationals – for the simple reasons that (i) that directive does not apply in that situation, and (ii) it is precluded by the principle reaffirmed in Article 3(2) of Protocol No 4 to the ECHR.[70] In addition, it flows from Article 29(2) of the Citizenship Directive that a Member State cannot prohibit, on 'public health' grounds, the entry – after, for instance, a trip to Sweden – of nationals of other Member States who reside on its territory.[71] On the other hand, a Member State may, in principle, impose, on the Union citizens who cannot be banned from entering the national territory, other types of restrictions upon their entry that do not have an equivalent effect to a refusal. The quarantine and testing requirements imposed on Belgium residents upon their return from 'high risk' countries would fall within that category.[72]

61. In the second place, I am of the view that, contrary to what Nordic Info claims, Article 27(1) and Article 29(1) of the Citizenship Directive may also cover possible restrictions to the right of exit laid down in Article 4(1) of that directive, such as an exit ban.[73] Although the title of

70 See point 35 and footnote 61 above.

71 Indeed, under Article 29(2) a Member State cannot expel a Union citizen on 'public health' grounds after the expiration of a 'three-month period from the date of arrival'. It follows that a Member State can refuse the initial entry only of such a citizen on its territory, or expel that citizen before he or she has started exercising the right of residence provided in Article 7 of the Citizenship Directive. By contrast, once that citizen becomes a resident, if that person temporarily leaves the territory, he or she cannot be refused entry upon return on such grounds.

72 In respect of Belgian nationals, since the principle reaffirmed in Article 3(2) of Protocol No 4 to the ECHR does not preclude such measures (see footnote 61 above), they could be adopted pursuant to Article 21(1) TFEU, with the conditions laid down in Article 27(1) and Article 29(1) of the Citizenship Directive applying by analogy.

73 See, to that effect, judgments of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraphs 19 to 22); of 17 November 2011, *Gaydarov* (C-430/10, EU:C:2011:749, paragraphs 26, 29 and 30); and of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraphs 35 and 36).

Chapter VI could mislead the reader in that respect,[74] first, the expression 'freedom of movement' used therein is clearly broad enough to encompass that right. Secondly, it does not follow from the fact that Article 29(2) addresses, in essence, a specific measure, namely the refusal of leave to enter, that only restrictions to the right of entry are allowed on 'public health' grounds – since the point of that provision is not to list all the permissible restrictions to freedom of movement under Article 27(1) and Article 29(1), but simply to frame the use of that measure. Additionally, that interpretation is in line with the aim pursued by the 'public health' derogation laid down in those provisions – which is, as follows from the wording of that last provision, to allow a Member State to protect its territory and population against the spread of certain infectious or contagious diseases. Granted, the drafters of Article 29(1) (probably) had in mind the example of a Member State preventing travellers carrying such diseases from entering its territory and 'bringing in' the disease with them. That said, protection of a State's territory may also, in some situations, justify restricting the exit of its own residents, to prevent them 'bringing back' such diseases when they return.[75] Finally, that interpretation is confirmed by the *travaux préparatoires* [76] of the Citizenship Directive.[77]

(2) The possibility of restricting free movement by way of general measures

62. The national measures at issue in the main proceedings were of general application. Indeed, the travel ban and quarantine and testing requirements applied systematically to abstract and broad categories of persons in objectively determined situations – persons travelling to or from a 'high risk' EU Member State for a 'non-essential' purpose, persons travelling to or from a third country not in the Schengen Area, and so on.

63. However, Nordic Info claims that only individual measures restricting the right to free movement may be justified on the basis of Article 27(1), read in conjunction with Article 29(1), of the Citizenship Directive. Such measures could be adopted only on a case-by-case basis, where an individual assessment of a given person's situation reveals that he or she poses a threat to public health – because that person has symptoms of, or has been exposed to, one of the diseases mentioned in that provision – and thus, presents a genuine risk of being infected and spreading that disease.

74 Chapter VI of the Citizenship Directive is entitled 'Restrictions on the *right of entry* and the right of residence on grounds of public policy, public security or public health' (my emphasis).

75 See, with respect to COVID-19, point 102 below.

76 In the Commission's proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final), Article 27 (then Article 25) referred to 'decisions whereby Union citizens … are refused entry …', while Article 29 (then Article 27) referred to 'refusal of leave to enter …'. However, these provisions were amended during the proposal's legislative passage, to refer instead to possible restrictions of 'freedom of movement', an expression which was deemed preferable as 'it covers all types of measure – removal, refusal of leave to enter the territory and refusal to leave' (see Amended proposal for a Directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2003) 199 final, pp. 8, 29 and 30). The fact that the title of Chapter VI was not amended accordingly is, thus, a mere omission of the EU legislature. The same goes for the fact that Article 29(1) still refers to the 'host Member State', instead of using a more general term such as 'the Member State in question', to cater for the situation where a Member State would restrict the right of exit of its own nationals.

77 By analogy, the right of exit provided in Article 2(2) of Protocol No 4 to the ECHR can be restricted, particularly on 'public health' grounds (see Article 2(3)).

64. Like the Belgian, Romanian and Norwegian Governments, as well as the Commission, I am of the view that general restrictions on the freedom of movement may, pursuant to Article 27(1) and Article 29(1) of the Citizenship Directive be adopted, on 'public health' grounds, without the need for such a case-by-case assessment. [78]

65. First, those provisions refer, respectively, to the 'restrictions' that Member States may implement and to the 'measures restricting freedom of movement' which they may adopt on 'public health' grounds. Those broad terms are capable of encompassing both individual and general measures.

66. Secondly, the general scheme of Chapter VI of the Citizenship Directive supports that interpretation. Indeed, whereas Article 27(2) provides, with respect to measures taken on grounds of 'public policy' or 'public security', that they 'shall be based exclusively on the personal conduct of the individual concerned' and that 'justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted', Article 29 mentions no such requirement with respect to measures taken on 'public health' grounds. [79]

67. Admittedly, that difference in wording cannot, in itself, be decisive. The text of the Citizenship Directive is not free of inconsistencies. [80] In the past, the Court has rightly extended the need for an individual assessment to other provisions of the Citizenship Directive which do not expressly mention it. It did so, in particular, in its judgment in *McCarthy and Others*, [81] with respect to measures taken on the grounds of abuse of rights, under Article 35 of that directive.

68. However, the Court should be wary of doing so in relation to measures taken on 'public health' grounds, under Article 27(1) and Article 29(1) of that directive. Indeed, like the Belgian, Romanian and Norwegian Governments as well as the Commission, I observe, as a third point, that it is logical to give greater room for discretion to the Member States when it comes to threats to 'public health', as opposed to threats to 'public policy' or 'public security' and abusive behaviour since those are, quite simply, different matters.

69. On the one hand, threats to 'public policy' or 'public security' usually stem from the behaviour of certain specific individuals, such as terrorists or dangerous criminals. Therefore, public authorities should not, in principle, be able to adopt, especially in view of the importance of the right to free movement enjoyed by Union citizens, blanket measures on precautionary grounds, such as banning the entry of all persons travelling from certain countries because some of them may be dangerous. Not only would it go beyond what is necessary in that respect, but I take the

78 See, for the same view, Goldner Lang, I., '"Laws of Fear" in the EU: The Precautionary Principle and Public Health Restrictions to Free Movement of Persons in the Time of COVID-19', *European Journal of Risk Regulation*, 2021, pp. 1 to 24; Thym, D., and Bornemann, J., 'Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism, Law and Politics', *European Papers*, Vol. 5, No 3, 2020, pp. 1162 to 1163; van Eijken, H.H., and Rijpma, J.J., 'Stopping a Virus from Moving Freely: Border Controls and Travel Restrictions in Times of Corona', *Utrecht Law Review*, Vol. 17, No 3, 2021, pp. 34 to 50.

79 It is true that Article 29(3) of the Citizenship Directive provides that a Member State cannot, 'as a matter of routine', make entry on its territory conditional on a medical examination 'to certify that [the Union citizens arriving] are not suffering from any of the conditions referred to in [Article 29(1)]'. It can only do so 'where there are serious indications that it is necessary'. The Commission indicated, in the explanatory notes of its initial proposal, that that statement was meant to clarify that the 'public health' derogation may be used only 'where there are serious indications that the person concerned suffers from one of the diseases [envisioned in Article 29(1)]'. However, that does not mean, in my view, that only individual measures can be adopted pursuant to Article 29(1). Indeed, the fact that a person exhibits symptoms of a disease with epidemic potential may constitute a 'serious indication' that such a measure is necessary. However, the same is also true of the fact that he or she seeks to travel temporarily to, or is coming from, a country facing a serious outbreak of that disease. Accordingly, restrictive measures generally applicable to persons travelling from, or seeking to travel to, such a country do not conflict with Article 29(3).

80 See point 61 and footnote 76 above. To give one more example: Article 27(2) refers to the principle of proportionality while Article 29 does not, despite the fact that that principle must always be respected (see point 91 below).

81 Judgment of 18 December 2014 (C-202/13, EU:C:2014:2450, paragraphs 43 to 58).

view that, in a democratic society, except in very exceptional circumstances, public authorities should not be allowed to assume that individuals are dangerous simply because they belong to such a broad and abstract category of persons.[82] In this respect, considerations of individual dignity are relevant. Indeed, in many cases, such an approach would be based on prejudice.[83] The same logic applies with regard to preventing abuse of the right to free movement. Even when faced with many cases of abusive entry of third-country nationals pretending to be family members of Union citizens, Member States cannot, on precautionary grounds, adopt blanket measures depriving all those family members of the right they derive, inter alia, from the Citizenship Directive.[84]

70. On the other hand, the threat to 'public health' which is relevant under Article 29(1) of the Citizenship Directive, that is, the risk of spreading of certain 'diseases with epidemic potential' or 'other infectious diseases or contagious parasitic diseases' on a Member State's territory, is usually not related to the behaviour of certain specific individuals. The epidemiological situation in a given country may be a relevant consideration in that regard.[85] In certain circumstances, depending on their degree of contagiousness, a large part, if not a whole population, may be infected. In that context, individual measures taken at the point of entry or exit of travellers on a Member State's territory, on the basis of apparent symptoms or confirmed exposure to the diseases in question may not always be sufficiently effective to prevent or limit its spread.[86] General restrictions on free movement, adopted on precautionary grounds, targeting, for instance, all persons travelling from certain 'high risk' countries or regions may be necessary in that regard. Article 27(1) and Article 29(1) of the Citizenship Directive should be construed accordingly. While those provisions, as derogation clauses, must be interpreted strictly,[87] that interpretation must nevertheless ensure that they are fit for purpose.[88] Furthermore, pursuant to Article 168(1) TFEU 'a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities', including the free movement of persons – an imperative so important that it is restated in the second sentence of Article 35 of the Charter. Control of epidemics is an inherent part of that objective.[89]

71. There is one, final counterargument that must be addressed before closing this section. Indeed, Articles 30 and 31 of the Citizenship Directive contain safeguards for Union citizens subject to measures restricting the rights they derive from that directive. National authorities must, under Article 30(1) and (2), respectively notify the 'persons concerned' of 'any decision

82 See, to that effect, judgment of 2 April 2020, *Commission* v *Poland, Hungary and Czech Republic (Temporary mechanism for the relocation of applicants for international protection)* (C-715/17, C-718/17 and C-719/17, EU:C:2020:257, paragraphs 135, 159 and 160).

83 See, to that effect, see Opinion of Advocate General Mayras in *Bonsignore* (67/74, EU:C:1975:22, p. 315).

84 See, to that effect, judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraph 56).

85 See, *mutatis mutandis*, judgment of 4 April 2017, *Fahimian* (C-544/15, EU:C:2017:255 paragraphs 40 and 41).

86 See, in relation to COVID-19, point 109 below.

87 See, inter alia, judgment of 22 June 2021, *Ordre des barreaux francophones et germanophone and Others (Preventive measures for removal)* (C-718/19, EU:C:2021:505, paragraph 56 and the case-law cited).

88 See, by analogy, judgment of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625, paragraphs 53 to 55 and the case-law cited). Admittedly, an individual assessment is usually required to ensure, besides the necessity of the restrictive measures in question, the strict proportionality of those measures. However, with respect to general measures taken on 'public health' grounds, that proportionality can be ensured by properly tailoring them and by ensuring that very specific individual circumstances could be taken into account at the moment of enforcement, as I will explain in points 128 to 132 below.

89 See, to that effect, the second subparagraph of Article 168(1) TFEU, specifying that EU action in the field of public health is to cover, notably 'monitoring, early warning of and combating serious cross-border threats to health'. It is true that, as I will explain in relation to the Schengen Borders Code, in Part B of this Opinion, some 'public health'-related situations are so serious that they could be said to constitute threats to 'public policy', which could lead to the paradoxical situation that, in those cases, measures restricting free movement could only be adopted on an individual basis. However, in my view, that issue can be resolved through a simple application of the *lex specialis* doctrine. Since the legislature has laid down, in the Citizenship Directive, a special regime for measures taken on 'public health' grounds, it follows that that regime, to the extent that it derogates from the regime applicable to measures adopted on 'public policy' grounds, should prevail over the latter.

taken under Article 27(1)' and inform them of 'the public policy, public security or public health grounds on which the decision taken in their case is based'. Furthermore, under Article 31(1) of that directive, those authorities must ensure that 'the persons concerned' have access to redress procedures 'to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health'.

72. In that context, Nordic Info submits that the fact that those provisions consistently refer to 'decisions' addressed to certain 'persons concerned' necessarily implies that only individual measures may be taken on the basis of Article 27(1) of the Citizenship Directive, even on 'public health' grounds. The point could also legitimately be made that, since the safeguards in question were designed, in the words of the Court, to 'enable the person concerned to put forward circumstances and considerations relating to his [or her] individual position',[90] allowing Member States to adopt, on the basis of that provision, measures of general application could deprive those safeguards of their substance.

73. I do not consider that to be the case. First, as the Commission points out, the purpose of Articles 30 and 31 of the Citizenship Directive is not to circumscribe the type of measures that can be adopted under Article 27(1) thereof, but only to provide for certain safeguards when such measures are taken. The fact that Articles 30 and 31 use the term 'decision', as opposed to the broader terms of 'restrictions' or 'measures', merely reflects the fact that, as it can be concluded from the foregoing, individual measures are often required under that directive and, clearly, the EU legislature had those measures in mind when drafting those provisions. In general, the terms 'measures' and 'decisions' are used seemingly interchangeably in the Citizenship Directive, and not always in a coherent manner,[91] in the sense that no conclusion can be drawn from the use of one term or the other in a given provision. Secondly, while those provisions were not drafted with general measures in mind, that does not mean that the possibility of adopting such measures on 'public health' grounds would deprive those provisions of all effectiveness. Union citizens should still be able, to a certain extent, to 'put forward circumstances and considerations relating to [their] individual position'. I will return to that aspect in points 115 to 119 below.

(b) Whether the conditions laid down in Article 27(1) and Article 29(1) of the Citizenship Directive were fulfilled in the circumstances at issue

74. I have explained, in the previous sections, why national measures such as those contested in the main proceedings *may*, in principle, be justified under Article 27(1), read in conjunction with Article 29(1), of the Citizenship Directive.

75. However, in order to be fully compatible with those provisions, such measures must fulfil all the conditions stemming therefrom. More specifically, they must have been implemented in response to a serious, genuine and relevant threat to 'public health' (1) and must respect the principles of legal certainty (2), equal treatment (3) as well as proportionality (4). It is for the Member State in question to demonstrate that that is the case. Furthermore, it will ultimately be for the referring court, which alone has jurisdiction to assess the facts, to determine whether those conditions are fulfilled in the main proceedings. The Court, however, may provide guidance on the matter, based on the information before it. To that end, I will examine those conditions in turn in the following sections.

90 Judgment of 18 December 2014, *McCarthy and Others* (C-202/13, EU:C:2014:2450, paragraphs 50 and 51).

91 For instance, Article 27(2) refers to 'measures', whereas, pursuant to that very provision, only individual measures, that is, decisions, may be taken on grounds of 'public policy' or 'public security.

(1) The existence of a serious, genuine and relevant threat to 'public health'

76. As indicated above, the use of the 'public health' justification laid down in Article 27(1) of the Citizenship Directive is framed by Article 29. That last provision contains a precise definition of the relevant circumstances in which such grounds can validly be invoked.[92] Pursuant to its first paragraph, only certain diseases can justify the implementation of measures restricting freedom of movement. These include 'diseases with epidemic potential as defined by the relevant instruments of the [WHO]' – that is, the International Health Regulations (2005) ('the IHR').[93]

77. COVID-19 obviously falls within that category. I observe that, on 30 January 2020,[94] the WHO Director-General determined that the outbreak of the disease in question was a 'public health emergency of international concern' within the meaning of that instrument.[95] Furthermore, on 11 March 2020, the same institution, in the light of the exponential increase of reported cases and countries affected, characterised COVID-19 as a pandemic.[96]

78. However, the fact that certain measures have been adopted with such a disease in mind is not sufficient for them to be regarded as justified under Article 27(1) and Article 29(1) of the Citizenship Directive. Indeed, pursuant to the Court's settled case-law, when public authorities invoke 'public health' grounds as a justification for restricting the right to free movement enjoyed by Union citizens, they must demonstrate satisfactorily, that the measures in question are necessary in order effectively to protect the interests referred to in those provisions.[97] While it follows from the very rationale of Article 29(1) that, generally speaking, the diseases mentioned therein are regarded as posing a *serious* threat to 'public health', preventive measures against such diseases cannot be imposed on Union citizens as a matter of routine:[98] that threat must be *genuine*, not merely hypothetical, in the circumstances at hand. Public authorities must accordingly show, by carrying out a risk assessment, on the basis of the most reliable scientific data available at the material time and the most up-to-date results of international research, the probability that the threat in question is likely to materialise, as well as the severity of the impact on 'public health' if indeed it does.[99]

79. Nevertheless, as the intervening governments and the Commission submit, it also follows from the Court's case-law that, where, after such a risk assessment has been carried out, uncertainty remains as to the existence or extent of the alleged risk to 'public health', but the likelihood of real harm to that interest persists should the risk materialise, a Member State may, under the precautionary principle, take measures without having to wait until the reality and seriousness of that risk become fully apparent.[100] Although there must still be some evidence of

92 See, to that effect, recital 22 of the Citizenship Directive.

93 The IHR are binding on all the Members of the WHO. The EU Member States are included.

94 WHO, 'Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)', 30 January 2020.

95 Pursuant to Article 1 of the IHR, that means 'an extraordinary event which is determined … to constitute a public health risk to other States through the international spread of disease …'.

96 WHO, 'WHO Director-General's opening remarks at the media briefing on COVID-19', 11 March 2020.

97 See, by analogy, judgment of 19 November 2020, *Ministère public and Conseil national de l'ordre des pharmaciens (Marketing of cannabidiol (CBD))* (C-663/18, EU:C:2020:938, paragraph 87 and the case-law cited). Similarly under Article 2(3) of Protocol No 4 to the ECHR, a measure interfering with the right to leave laid down in Article 2(2) is regarded as 'necessary in a democratic society' for the protection of public health if it answers a 'pressing social need' and, in particular, if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.

98 See, to that effect, Article 29(3) of the Citizenship Directive.

99 See, by analogy, judgment of 19 November 2020, *Ministère public and Conseil national de l'ordre des pharmaciens (Marketing of cannabidiol (CBD))* (C-663/18, EU:C:2020:938, paragraphs 88 and 91 and the case-law cited).

100 Ibid., paragraph 92.

the need for precautionary measures, the burden of proof is low in such circumstances, allowing national authorities to act with the urgency required. Therefore, a court called upon to assess such measures should, in my view, limit itself to reviewing whether the authorities' assessment of the existence of a genuine and serious threat to 'public health' is based on *reasonable* grounds.

80. In the present case, there is no dispute that that was the case, with respect to COVID-19, during the height of the 'first wave' of the pandemic in the European Union. At the time, the exponential rise in the number of cases turned the outbreak of that disease into a 'health crisis'. Irrespective of the scientific uncertainty surrounding the source, transmissibility, infection dynamics and effects of the (then) novel coronavirus, public authorities had more than enough reasonable grounds to believe that the pandemic posed a genuine and serious threat to the security of healthcare supply – as national healthcare systems struggled to cope with the number of persons who had to be hospitalised – as well as to the very life and physical integrity of their population. Moreover, it is hard to refute the observation that, at the time, the pandemic was 'capable of having very serious consequences not just for health but for society, the economy, the functioning of the State and life in general'. [101]

81. Accordingly, public authorities could reasonably, to say the least, take the view that controlling the spread of COVID-19 had become a necessity in order to safeguard their healthcare systems and mitigate the consequences of the virus on society at large and that, to that effect, they needed, inter alia, to implement a set of 'non-pharmaceutical interventions', including travel restrictions, in an attempt to slow down community transmission [102] of the disease. [103]

82. However, the crucial issue, for the purposes of the case in the main proceedings, is to know whether that was still the case, in Belgium, at the time the contested measures where adopted and implemented to the detriment of Nordic Info – that is, broadly speaking, at the beginning of July 2020. Indeed, the lawfulness of those measures must be assessed in the light of the prevailing context. [104]

83. At that time, the severity of the 'first wave' had passed. The overall epidemiological situation in the European Union was already showing signs of improvement from as early as May, which gave cause for 'cautious optimism', [105] so much so that the Commission invited the Member States to consider the progressive easing and, eventually, lifting of the travel restrictions that they had put in place between themselves in early March. [106] That improvement was confirmed in June.

[101] ECtHR, judgment in *Terheş v. Romania*, § 39. See also, WHO, 'COVID-19 strategic preparedness and response – COVID-19 Strategy Update', 14 April 2020, indicating that, on 13 April 2020, more than 1.7 million people had been infected worldwide, while almost 85 000 people had lost their lives. The virus' ability to spread rapidly had overwhelmed even the most resilient healthcare systems. Back then, 20% of the overall cases were severe or critical, with a fatality rate of over 3%, increasing in older age groups and in those with underlying health conditions.

[102] The expression 'Community transmission' refers to the process of an infectious illness spreading through a large group of people through casual contact.

[103] See European Council, Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 17 March 2020, and WHO, 'COVID-19 strategic preparedness and response – COVID-19 Strategy Update', 14 April 2020.

[104] See, to that effect, judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 62 and the case-law cited).

[105] European Commission, 8 May 2020, communication from the Commission to the European Parliament, the European Council and the Council on the second assessment of the application of the temporary restriction on non-essential travel to the EU (COM(2020) 222 final).

[106] European Commission, 15 May 2020, Communication from the Commission, Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19 (OJ 2020 C 169, p. 30).

Accordingly, several Member States lifted those restrictions on 15 June, and the Commission encouraged the remaining Member States to do the same. The temporary restriction on non-essential travel in the European Union was also eased on 30 June. [107]

84. However, the Belgian Government submits that, while the epidemiological situation in the European Union at the beginning of July had improved overall, the pandemic was neither over nor fully under control. That situation, in fact, differed very much from one country to another. While it was stabilised in Belgium, objective data [108] showed significant surges in infections occurring in other Member States, including Sweden. Given the highly contagious nature of the virus, [109] the Belgian authorities took the view that the risk of a full-blown resurgence of the pandemic on the national territory – a (then) potential 'second wave' – was genuine, especially if containment measures were lifted too soon in view of the start of the summer holidays. Hence they decided to maintain some of those measures, including the contested travel restrictions, while adapting them to the risk.

85. In my view, the Belgian authorities' assessment of the risk to 'public health' at material time seems reasonable, in the light of the precautionary principle. [110] The contested measures, thus, seemed to be justified under Article 27(1) and Article 29(1) of the Citizenship Directive. The fact that there was, at that time, no authorised and/or effective treatment or vaccine to mitigate the impact that the virus could have on the population tends to confirm the reasonableness of that assessment. However, as the Commission points out, the extent of the risk would also have depended on the foreseeable capacity of, inter alia, the Belgian healthcare system to cope with a potential new surge in infections on the national territory, which would be for the referring court to verify. [111]

86. By contrast, the fact that other Member States lifted, around that time, some or all of the measures they had put in place to limit transmission of the virus is not decisive in that regard. Indeed, given that, first, human health and human life rank foremost among the interests protected by the FEU Treaty, [112] secondly, that competence in that field is mostly left to the Member States [113] and, thirdly, that any EU action must respect the 'responsibilities' of the Member States in the matter, [114] the Court has repeatedly held that it is for the Member States to determine, in particular, 'the level of protection which they wish to afford to public health' and that they must, accordingly, be allowed a 'measure of discretion' in that field. [115] Thus, although

107 European Commission, 11 June 2020, Communication from the Commission to the European Parliament, the European Council and the Council on the third assessment of the application of the temporary restriction on non-essential travel to the EU (COM(2020) 399 final).

108 Belgium referred to the data of its national health institute. See, also, ECDC, Coronavirus disease 2019 (COVID-19) in the EU/EEA and the UK – tenth update, 11 June 2020, Stockholm, p. 3, and Coronavirus disease 2019 (COVID-19) in the EU/EEA and the UK – eleventh update: resurgence of cases, 10 August 2020, Stockholm, p. 3.

109 Which had already the subject of studies published in spring 2020. See Liu, Y., Gayle, A., Wilder-Smith, A., and Rocklöv, J., 'The reproductive number of COVID-19 is higher compared to SARS coronavirus', *J. Travel Med*, 2020. That high degree of contagiousness appeared all the more evident, in early July 2020, since the WHO had just acknowledge that the virus was airborne (see WHO, Coronavirus disease (COVID-19), Situation Report -172, 10 July 2020).

110 See also WHO, Coronavirus disease (COVID-19), Situation Report -172, 10 July 2020, with the WHO Regional Director for Europe urging countries to 'stand firm and stay focused'.

111 I observe that that assessment of the risk, based on epidemiological data and local capacities, generally follows that developed by the WHO and the EU institutions in their respective recommendations. See, inter alia, WHO, 'COVID-19 strategic preparedness and response – COVID-19 Strategy Update', 14 April 2020, and European Commission, 15 May 2020, Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19.

112 See, in that regard, Article 168(1) TFEU and second sentence of Article 35 of the Charter.

113 See, however, point 95 below.

114 See Article 168(7) TFEU.

115 See, inter alia, judgment of 19 January 2023, *CIHEF and Others* (C-147/21, EU:C:2023:31, paragraph 50 and the case-law cited).

some Member States evidently considered the level of COVID-19-related risk to be acceptable, that does not call into question the reasonableness of the Belgian authorities' assessment of the need for precautionary measures in Belgium. [116]

(2) The contested travel restrictions were transparent

87. While, on the face of it, the Belgian authorities had legitimate reasons to implement precautionary measures at the material time, in order to be compatible with Article 27(1) and Article 29(1) of the Citizenship Directive, those measures also had to be transparent, that is to say, comply with the principle of legal certainty. That principle requires, in particular, that rules of law be clear and precise and predictable in their effect, especially where they have, as in the present case, negative consequences for individuals and undertakings. [117]

88. In my view, the contested measures were formulated with sufficient clarity and precision to enable the persons concerned to regulate their conduct. First, the measures were clearly defined – travel ban, quarantine and testing requirements. Secondly, the list of 'high risk'/'red' countries in relation to which they applied was available on a dedicated web page and, thus, easily accessible. Thirdly, it is true that those measures were based on a concept – that of 'non-essential' travel – the open nature of which created some uncertainty for the persons seeking to travel to and from Belgium. The Belgian Government explained that, while that concept was not specified in the applicable regulations, an illustrative list of reasons for travel regarded as 'essential' was nevertheless available online, which corresponded to the list applicable in the context of the temporary restriction on non-essential travel to the European Union. [118] This undoubtedly helped people to understand whether the trip they were planning could be regarded as 'essential' or not. Nevertheless, while, on the basis of that list, some trips were clearly prohibited – tourist trips, for example – some of the entries on that list, such as 'travel for imperative family reasons', were also open-ended. In that regard, it seems to me that the national authorities were required, under the principle of legal certainty, to put in place a mechanism allowing the public to ask in advance, through appropriate means, whether a certain reason for travel – related, for instance, to family – was regarded as 'essential' or not, so as to avoid being faced with an unexpected refusal on departure or arrival. In fact, the Belgian Government explained that it had provided an online 'FAQ' on the matter. Every time such a question was frequently asked by the public, an answer was provided therein by the authorities. That would seem to satisfy the requirement I have just stated.

(3) The contested travel restrictions applied in a non-discriminatory manner

89. In order to be compatible with Article 27(1) and Article 29(1) of the Citizenship Directive, the contested measures also had to be applied in a non-discriminatory manner. [119]

116 As a side note, I would add that, while Article 27(1) of the Citizenship Directive features the caveat that 'public health' grounds cannot be invoked 'to serve economics ends', it was obviously not the case here, as the Belgian Government submits. Granted, the contested restrictions were introduced to ensure, inter alia, that the Belgian healthcare system had the material, personnel and also *financial* capacity to cope with the pandemic. However, any public measure involves some financial considerations. Only those that pursue an 'exclusively economic objective' are problematic (judgment of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraph 39)). The maintenance of a functioning healthcare system does not fall within that category (see, by analogy, judgment of 28 January 2016, *CASTA and Others* (C-50/14, EU:C:2016:56, paragraph 61 and the case-law cited)).

117 See, inter alia, judgment of 11 June 2015, *Berlington Hungary and Others* (C-98/14, EU:C:2015:386, paragraphs 74, 76 and 77 and the case-law cited).

118 See, notably, Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (OJ 2020 L 208 I, p. 1), Annex II.

119 See Article 27(1) of the Citizenship Directive ('… irrespective of nationality …').

90. That aspect can be addressed briefly since it clearly seems to have been the case. First, the ban on exit from the Belgian territory to 'high risk'/'red' countries applied irrespective of the nationality of the travellers. Secondly, with respect to the ban on entry, it is true that that measure did not apply to Belgian nationals and nationals of other Member States residing in Belgium, whereas it was imposed on other Union citizens. However, that difference in treatment is justified because those categories of persons are not in a comparable situation. [120] Thirdly, quarantine and tests were required of Belgian residents on their return from the same countries, irrespective of nationality.

(4) The proportionality of the contested travel restrictions

91. In order to be compatible with Article 27(1) and Article 29(1) of the Citizenship Directive, the contested measures had, additionally, to comply with the principle of proportionality. [121] As will be explained in detail in the following sections, the assessment of that requirement encompasses a review of three cumulative criteria, namely whether those measures were 'appropriate' (i), 'necessary' (ii) and 'proportionate *sensu stricto*' (iii).

92. However, before delving into each of the criteria, some clarifications are required as regards the applicable standard of review of that principle in the present case. As the Norwegian Government points out, in public health matters, some restraint is called for in that regard. Indeed, the Court has repeatedly held that, in accordance with the 'measure of discretion' that Member States enjoy in that field, it is for them to determine not only the level of protection which they wish to afford to public health on their territory, but also 'the way in which that level of protection is to be achieved'. [122] Moreover, that discretion is particularly broad in circumstances such as those at issue in the main proceedings where public authorities seek to respond to a pandemic caused by a new virus, still at a relatively early and uncertain stage of that event, with limited time or knowledge to consider the most appropriate measures. In such a situation, the precautionary principle requires that public authorities have a significant leeway for action. [123]

93. To clarify, that does not mean that those authorities were given *carte blanche* when it came to their response to the COVID-19 pandemic, such that judicial review of their actions in that regard should be excluded. In fact, judicial review is all the more necessary since, on account of the urgency of the situation, the measures introduced to fight the spread of that disease were commonly adopted by governments alone, without following the normal democratic decision-making process and, in particular, without *ex ante* parliamentary review.

94. Thus, to reconcile, on the one hand, that broad margin of discretion and, on the other hand, the necessary compliance with legal standards, the scope of judicial review of the principle of proportionality in the present case should, in my view, be limited, here again, to whether the

120 See point 60 above.

121 Indeed, while that requirement is mentioned only in Article 27(2) of the Citizenship Directive, with respect to measures adopted on grounds of 'public policy' or 'public security', the principle of proportionality is a general principle of EU law, which must always be respected by the Member States when they restrict free movement (see, inter alia, judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 45 and the case-law cited)).

122 See, inter alia, judgment of 19 January 2023, *CIHEF and Others* (C-147/21, EU:C:2023:31, paragraph 50 and the case-law cited).

123 See, to that effect, judgment of 18 September 2019, *VIPA* (C-222/18, EU:C:2019:751, paragraph 72 and the case-law cited).

authorities could *reasonably* take the view that the contested measures were appropriate and necessary in order to manage the risk to 'public health' discussed above, and proportionate *sensu stricto*.[124]

95. I also wish to clarify at the outset that, around the material time, the EU institutions adopted,[125] in accordance with the European Union's limited competence in the field of public health,[126] a series of communications, recommendations and guidelines, in order to promote a degree of coordination between the various measures adopted by the Member States in response to the pandemic.[127] While those *soft-law* instruments were, by definition, not binding on the Member States, they were still required to duly take them into account in accordance with the principle of sincere cooperation. Thus, the recommended principles and norms laid down therein are relevant contextual elements in the present case.

(i) The contested travel restrictions seemed appropriate

96. Pursuant to the Court's settled case-law, the requirement that any measure restricting free movement be 'appropriate' encompasses two cumulative criteria: the measure at issue must, first, be liable to contribute to the achievement of the objective pursued, as well as, secondly, 'genuinely reflect a concern to attain it and be implemented in a consistent and systematic manner'.[128]

– *Those travel restrictions seemed liable to contribute to the objective pursued*

97. To satisfy the first part of the 'appropriateness' requirement, the Belgian Government was required to show that travel restrictions such as the contested restrictions could contribute to preventing the risk of a new surge in COVID-19 cases on the Belgian territory. Corroborating scientific evidence on the matter is required. That said, here too, under the precautionary principle, the burden of proof is low. Indeed, at the material time, whereas the threat posed by the pandemic seemed genuine and serious, there was a significant degree of uncertainty concerning the available solutions to address it.

98. In that respect, that government submits that, while it was not possible to establish with certainty, at the material time, that those measures would have a preventive effect, it was still reasonable, on the basis of the scientific information available at that time, to assume that that may be the case. There was a 'broad consensus' among national medical experts and government advisers that the international movements of persons were significantly contributing to the spread of COVID-19. Restricting those movements appeared therefore to be an appropriate measure to control the pandemic.

124 See, to that effect, judgments of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 36), and of 1 March 2018, *CMVRO* (C-297/16, EU:C:2018:141, paragraphs 70 and 71).

125 A timeline of EU action in relation to COVID-19 is available at https://commission.europa.eu/strategy-and-policy/coronavirus-response/timeline-eu-action_en.

126 Pursuant to Article 168(1) and (2) TFEU, EU action must 'complement national policies', 'encourage cooperation between the Member States … and, if necessary, lend support to their action' with regard to, notably, to the 'monitoring … and combating serious cross-border threats to health'. To that effect, the Commission 'may, in close contact with the Member States, take any useful initiative to promote [the Member States'] coordination', in particular through 'the establishment of guidelines'. Finally, pursuant to Article 168(5), the European Parliament and the Council may also adopt, notably 'measures concerning monitoring, early warning of and combating serious cross-border threats to health'.

127 I emphasise, however, that complete coordination on travel measures within the European Union was achieved only *after* the material time. See 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).

128 See, inter alia, judgment of 7 September 2022, *Cilevičs and Others* (C-391/20, EU:C:2022:638, paragraphs 74 and 75 and the case-law cited).

99. I agree that the Belgian authorities could reasonably assume that travel restrictions were liable to contribute to the achievement of the 'public health' objective pursued. However, further clarification is called for in that regard since that contribution is not as self-evident as has been suggested by the intervening governments and the Commission to the Court.

100. Indeed, as regards the scientific basis for such measures, I note that, before COVID-19, it was generally considered that travel restrictions were not effective in containing outbreaks of epidemic diseases.[129] Accordingly, in the early weeks of the pandemic, the WHO did not recommend the implementation of such restrictions in relation to China or other countries.[130] However, as we know, most countries disregarded the WHO's advice in that respect.[131] The EU institutions themselves approved the travel restrictions put in place within the European Union by the Member States and recommended the implementation of the coordinated temporary restriction on non-essential travel to the European Union, taking the view that the large influx of persons travelling from countries affected by the virus entailed the 'importation' of a considerable number of 'foreign' cases of COVID-19 in their countries of arrival, which could, and indeed did, produce local outbreaks.[132] In that context, various scientific papers published in the spring of 2020 suggested that those travel restrictions indeed contributed to limiting or, at the very least, delaying the initial arrival and outbreak of the disease in the countries concerned.[133] The WHO itself eventually reviewed its stance and considered that those measures had some value in that regard.[134]

101. It should be noted, however, that, at the material time, COVID-19 had already established itself within the Belgian territory. One could legitimately wonder about the point of restricting international movement after the virus had already spread among the local population. Nevertheless, as the Belgian Government submits, and although the evidence on the matter available at the time was limited and inconclusive,[135] it was reasonable to assume that, in a context

129 See, inter alia, von Tigerstrom, B., and Wilson, K., 'COVID-19 travel restrictions and the International Health Regulations (2005)', *BMJ Global Health*, Vol. 5, No e002629, 2020; Grépin, K.A., Ho, T., Liu, Z., et al., 'Evidence of the effectiveness of travel-related measures during the early phase of the COVID-19 pandemic: a rapid systematic review', *BMJ Global Health*, Vol. 6, No e004537, 2021.

130 See WHO, 'WHO advice for international travel and trade in relation to the outbreak of pneumonia caused by a new coronavirus in China', 10 January 2020; 'Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)', 30 January 2020.

131 Whether that is compliant with the IHR is beyond the scope of this Opinion. See, in that respect, von Tigerstrom, B., and Wilson, K., op. cit.

132 See European Commission, 16 March 2020, Communication from the Commission to the European Parliament, the European Council and the Council – COVID-19: Temporary Restriction on Non-Essential Travel to the EU (COM(2020) 115 final); European Commission, 16 March 2020, COVID-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ 2020 C 86I, p. 1); and European Council, Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 17 March 2020. That temporary recommendation, initially adopted for 30 days, was later prolonged until 30 June 2020. See European Commission, 8 April 2020, Communication from the Commission to the European Parliament, the European Council and the Council on the assessment of the application of the temporary restriction on non-essential travel to the EU (COM(2020) 148 final); 8 May 2020, Communication from the Commission to the European Parliament, the European Council and the Council on the second assessment of the application of the temporary restriction on non-essential travel to the EU (COM (2020) 222 final).

133 See, inter alia, Lau, H., et al. 'The association between international and domestic air traffic and the coronavirus (COVID-19) outbreak', *Journal of microbiology, immunology, and infection*, Vol. 53, No 3, 2020, pp. 467 to 472; Chinazzi, M., et al., 'The effect of travel restrictions on the spread of the 2019 novel coronavirus (COVID-19) outbreak', *Science*, Vol. 368, No 6489, 2020, pp. 395 to 400; Wells, C.R., et al., 'Impact of international travel and border control measures on the global spread of the novel 2019 coronavirus outbreak', *PNAS*, Vol. 117, No 13, pp. 7504 to 7509; and Linka, K., et al., 'Outbreak dynamics of COVID-19 in Europe and the effect of travel restrictions', *Computer methods in biomechanics and biomedical engineering*, Vol. 23, No 11, 2020, pp. 710 to 717. I note that those studies on the effectiveness of travel restrictions are based on models, rather than hard evidence – which were limited back then, as the authors recognise. They feature simulated, counterfactual scenarios – on the basis of assumptions about virus transmissibility, volume of sick travellers, and so on – of what would have happened had those measures not been in place.

134 See, inter alia, WHO, 'Updated WHO recommendations for international traffic in relation to COVID-19 outbreak', 29 February 2020, and 'Statement on the third meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of coronavirus disease (COVID-19)', 1 May 2020.

135 See ECDC Guidelines, pp. 18 and 19.

where, first, the epidemiological situation varied significantly from one Member State to another, with some countries experiencing a high rate of virus transmission, while the situation on the Belgian territory was comparably safe,[136] and where, secondly, it was expected, with the summer approaching, that a large influx of travellers would arrive or return from those higher-incidence countries for tourism-related reasons, maintaining some travel restrictions between Belgium and those countries made sense. It could contribute – to a limited, yet appreciable, extent[137] – to preventing the risk of a new surge in COVID-19 cases on the Belgian territory. Indeed, it could prevent a significant import of 'foreign' COVID-19 cases that could, in turn, upset the fragile local balance. In fact, the WHO itself envisaged the possibility of implementing or maintaining such restrictions as one of the appropriate measures to limit community transmission in such context.[138]

102. Obviously, once it seems established – to a reasonable degree – that restricting international movements of persons could contribute to limiting the spread of COVID-19, it can hardly be doubted that, as the intervening governments submit before the Court, the contested ban on 'non-essential' travel was appropriate for the purposes of limiting such movement between Belgium and the 'high risk' countries in question. The 'entry' ban prevented the risk of travellers from those areas 'bringing in' cases of the disease with them. The 'exit' ban prevented Belgian residents from travelling to those areas with the same result on their return. In addition, the quarantine and screening test requirements imposed on Belgian residents allowed, as the Belgian Government argues, the authorities to follow closely their state of health, which was liable to contribute to the detection and isolation of suspected imported cases, thus limiting the risk of transmission to the local population.[139]

– *The contested travel restrictions seemed consistent*

103. The question whether the contested travel restrictions 'genuinely reflected' a concern to achieve the 'public health' objective pursued depends on whether those measures were part of a broader strategy to limit the spread of COVID-19.[140] That seems to have been the case. The Belgian Government indicates that other 'non-pharmaceutical interventions' designed to prevent community transmission – such as hygiene measures, testing, isolation and contact tracing – were in place at that material time. In addition, where a Member State restricts, as Belgium did at that

136 I recall that, under the applicable methodology, the countries regarded as 'high risk', in relation to which the contested travel restrictions applied, were those where the national incidence of new cases of COVID-19 was more than 10 times higher than that of Belgium (100 reported cases per 100 000 inhabitants within the previous 14 days) (see point 15 above).

137 I note that, to be considered appropriate, a given measure does not have to be liable to eliminate, on its own, the risk for 'public health' in question. It suffices that it may bring an appreciable contribution in that regard (see, to that effect, judgment of 19 January 2023, *CIHEF and Others* (C-147/21, EU:C:2023:31, paragraph 56)).

138 See, inter alia, WHO, 'COVID-19 strategic preparedness and response – COVID-19 Strategy Update', 14 April 2020, and 'Public health considerations while resuming international travel', 30 July 2020. The Commission suggested such a course of action in several communications (see, inter alia, European Commission, 15 May 2020, Communication from the Commission Towards a phased and coordinated approach for restoring freedom of movement and lifting internal border controls – COVID-19) – even if, as indicated above, at the material time, it was advocating the lifting of travel restrictions within the European Union. The coordinated temporary restriction on non-essential travel to the European Union also followed a similar logic from 1 July 2020 onwards, with restrictions applying only in relation to countries having a comparably worse COVID-19 situation than the European Union. See Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction (OJ 2020 L 208I, p. 1). The methodology and criteria used to assess the situation in a given country (the number of new infections per 100 000 inhabitants over the previous 14 days, the trend in new infection rate over the same period and the overall response to COVID-19) were also analogous to the criteria used by Belgium at the material time (see point 15 above).

139 See, regarding such measures as appropriate, inter alia, European Commission, 16 March 2020, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ 2020 C 86I, p. 1), paragraph 21; WHO, Key considerations for repatriation and quarantine of travellers in relation to the outbreak of novel coronavirus 2019-nCoV, 11 February 2020. See also, generally, Article 31(2)(c) of the IHR.

140 See, by analogy, judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 38).

time, travel from and to other Member States on the grounds of their comparatively worse epidemiological situation, consistency requires, in my view, that it impose similar restrictions on movement to and from the areas, *within* the national territory, with an equally serious epidemiological situation.[141] It is not clear from the file whether that was the case in Belgium at that time. That should be verified by the referring court.

104. Regarding whether the contested measures were implemented in a consistent and systematic manner, I recall that their application depended on the epidemiological situation in the countries concerned, a factor that is clearly consistent with the public health objective pursued. Moreover, all countries in a similar epidemiological situation were treated in the same way in that regard. In addition, the assessment of that situation in every country was carried out on the basis of reasonably reliable and up-to-date data provided by the ECDC[142] – a factor that undoubtedly contributed to the consistency of the overall system.

105. The fact that the contested restrictions did not apply to travel for 'essential' purposes does not, in my view, call their consistency into question. Indeed, a limited number of reasons for travel were recognised as 'essential' . The scope of that exclusion was, accordingly, not such that it could have prevented the achievement of the public health objective pursued.[143] In fact, that exclusion was a necessity in the light of that objective. Hindering some of that 'essential' travel, in particular, the movement of 'essential' workers such as healthcare professionals, would have been detrimental to the fight against COVID-19. Finally, as I will explain in detail later, that exclusion was a requirement to ensure the strict proportionality of those measures.[144] Besides, the 'target' of the measures at issue was, I recall, the potential influx of travellers for tourism purposes that was not concerned by that exclusion.

(ii) The contested travel restrictions seemed necessary

106. The requirement that any measure restricting free movement be 'necessary' also encompasses two conditions. It must be ascertained, first, whether alternative measures exist which would be as effective as the measure chosen to attain the objective pursued whilst being less restrictive,[145] and, secondly, whether that measure is 'strictly necessary', that is, it does not go beyond what is required to achieve that objective.[146]

– *Whether there were less restrictive, but as effective, alternatives*

107. As a preliminary point on the matter, I would recall that it is for every Member State to determine both the level of protection that it wishes to afford to public health on its territory and the way in which that protection is to be provided – on condition that the requirements of EU law are satisfied. The fact that other Member States may have imposed less stringent measures is,

141 See, by analogy, judgment of 18 May 1982, *Adoui and Cornuaille* (115/81 and 116/81, EU:C:1982:183, paragraph 8). That did not affect the margin of discretion of Member States as to whether to pursue a more liberal or a more restrictive policy in response to the pandemic. They remained free to choose one or the other, but had, to be consistent, to treat comparable internal and external scenarios in a similar manner. See van Eijken, H.H., and Rijpma, J.J., op. cit., p. 43, and Thym, D., and Bornemann, J., op. cit., pp. 1168 and 1169.

142 See point 16 above.

143 See, by analogy, judgment of 7 September 2022, *Cilevičs and Others* (C-391/20, EU:C:2022:638, paragraph 76).

144 See points 128 to 132 below. See, by analogy, judgment of 19 May 2009, *Apothekerkammer des Saarlandes and Others* (C-171/07 and C-172/07, EU:C:2009:316, paragraph 45).

145 See, inter alia, judgment of 4 May 2016, *Philip Morris Brands and Others* (C-547/14, EU:C:2016:325, paragraph 160).

146 See, inter alia, judgment of 26 April 2012, *ANETT* (C-456/10, EU:C:2012:241, paragraph 45).

accordingly, not decisive.[147] Obviously, the higher the level of protection of public health sought, the stronger the measures necessary to attain it. Clearly, here, Belgium was seeking a high level of protection.

108. Turning now to the existence of alternatives to the contested travel restrictions, which would be as effective in protecting public health, while being less restrictive of the freedom of movement, I note that the burden of proof imposed on national authorities in that regard is not so extensive as to require them to demonstrate that *no other* measure could constitute such a viable alternative.[148] Thus, in the present case, there is no need to examine every conceivable measure. A review of the most obvious alternatives, which have been discussed before the Court, suffices.

109. First, imposing individual refusal of entry or quarantine measures only on certain travellers, for instance those with symptoms of the disease would, of course, have been *less restrictive*. However, it would not have been *as effective* in preventing the risk of 'importation' of COVID-19 cases, to the level sought by the Belgian authorities. Even assuming that symptom screening of all travellers at their point of entry on Belgian territory was feasible, it was reasonable to assume that such screening would allow for the identification of some carriers of the disease only, and that a proportion of them – that is, asymptomatic and pre-symptomatic people – would pass through the filter undetected.[149] General screening of travellers through rapid testing would have had similar shortcomings.[150]

110. Secondly, simply imposing quarantine on all travellers arriving or returning from 'high risk' countries would also not have been as effective in attaining the level of protection sought by the Belgian Government as a ban on travel to and from those countries, with quarantine requirements applying only to residents. Clearly, quarantining travellers for an appropriate period of time does contribute, to a certain extent, to alleviating the risk discussed above.[151] In theory, it ensures that everyone, including asymptomatic carriers and those in the pre-symptomatic, incubation phase, are isolated from the rest of the local population and, thus, do not cause chains of infection. However, as the Belgian and Norwegian Governments submit, while a travel ban prevents the risk of importation of 'foreign' COVID-19 cases on the national territory, quarantine, by contrast, is only a corrective measure, acting when such cases have already been imported and, depending on its modalities, is only partially effective in alleviating the risk of further transmission to the local population. Requiring people to quarantine at home, as was apparently the case here, has such shortcomings. Beyond the fact that people may not comply fully with the obligation to isolate themselves, they often share their homes with family members who could themselves become infected and spread the disease.[152]

147 See, inter alia, judgment of 10 March 2021, *Ordine Nazionale dei Biologi and Others* (C-96/20, EU:C:2021:191, paragraph 36 and the case-law cited).

148 See, inter alia, judgment of 23 December 2015, *Scotch Whisky Association and Others* (C-333/14, EU:C:2015:845, paragraph 55 and the case-law cited).

149 Indeed, studies published around the material time estimated that, during the first phase of the pandemic, more than half of the travellers who 'imported' cases from China to other countries arrived in the pre-symptomatic, incubation period, while already contagious, and started exhibiting symptoms only a few days after their arrival. See, inter alia, Wells, C.R., et al., op. cit., p. 7505, and the references therein. See, generally, on the lack of effectiveness of entry screening, ECDC Guidelines, p. 20.

150 As the Norwegian Government has submitted, scientific data available at the material time tended to indicate that there was, in relation to COVID-19, a 'window period' following infection, during which the biological markers used in testing remain negative.

151 See point 102 above. See also ECDC Guidelines, p. 20.

152 Granted, placing in strict quarantine all travellers in a dedicated facility next to their point of entry would have ensured proper isolation from the rest of the population. However, not only would it have been excessively difficult to put in place, it would have certainly been more than questionable from the perspective of fundamental rights.

– *The strict necessity of the contested travel restrictions*

111. As to whether the contested travel restrictions did not go beyond what was required to achieve the 'public health' objective pursued, I would recall that those measures applied solely in relation to the countries considered to pose a high infection risk for travellers. Moreover, it would seem – although that should be verified by the referring court – that whenever data concerning infection rate *within* a given country, at regional level, were available, the restrictions applied in a more targeted manner, in relation to travel between Belgium and problematic regions only. [153]

112. Admittedly, it may have been possible to come up with more tailored measures, which could have allowed for an even more targeted approach. The assessment of the epidemiological situation in a given country could have been fine-tuned. Considerations such as the rate of testing, structure of the population, and so on, could have allowed for a more precise assessment. [154] However, that would obviously have made that assessment more complex to carry out, while time was of the essence. As the Belgian and Norwegian Governments point out, EU law allows national authorities to adopt rules which are easy to apply and enforce, even if they may not lead to a perfect solution for every situation. [155]

113. I would recall further that, in order to satisfy the requirement at issue in this section, measures that restrict the right to free movement must also be accompanied by certain safeguards which are capable of ensuring that the interference with that right is effectively limited to what is strictly necessary. [156]

114. In the present case, a first safeguard against such an unnecessary interference lay, in my view, in the regular reassessment of the contested travel restrictions. [157] As the intervening governments and the Commission emphasise, the epidemiological situation in every country or region was regularly reviewed to ensure that those restrictions applied, in relation to a given area, as long as that situation was problematic. Data on national or regional infection rates were, it would seem, updated on a weekly basis, [158] so that public authorities could adapt the colour classification in a dynamic manner. [159] As for the general need for those measures, it would be for the referring

153 See, to that effect, points 14 and 15 above.

154 That method of calculation turned out, for instance, to be particularly unfair to Member States such as Luxembourg which had a far more intensive testing campaign than others and which, due to the number of cases identified through their testing practices, were considered to be 'high risk' countries even though the epidemiological situation on their territory was probably, in reality, similar to other countries classified as 'orange', which simply tested less stringently.

155 See, inter alia, judgment of 20 November 2019, *Infohos* (C-400/18, EU:C:2019:992, paragraph 49 and the case-law cited).

156 See, by analogy, judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, EU:C:2020:791, paragraph 132 and the case-law cited).

157 See, on the need to review periodically the persistence of the threat to public health that initially justified precautionary measures, inter alia, judgment of 11 July 2013 *France* v *Commission* (C-601/11 P, EU:C:2013:465, paragraph 110 and the case-law cited). See, as regards such a requirement with respect to travel restrictions, judgment of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraphs 44 and 47), and ECtHR, 8 December 2020, *Rotaru v. the Republic of Moldova* (CE:ECHR:2020:1208JUD002676412, § 25 and the case-law cited).

158 See point 16 above.

159 The case in the main proceedings would appear to provide a good example in that regard. On 12 July 2020, Sweden was classified as 'red' in the colour classification at issue, in accordance with the established methodology (see point 15 above), on the basis of the fact that, according to ECDC data from 10 July, the incidence rate over the previous 14 days was of 102.1 cases per 100 000 inhabitants, even though a downward trend could be observed. Consequently, travel restrictions applied as of that day. However, on 13 July, the ECDC published new data indicating a rate of 94.5/100 000 cases. A significant drop in infections was confirmed by the Swedish embassy the next day. Accordingly that country's classification was changed to 'orange' on 15 July, and travel restrictions lifted in relation to that country. Certainly, one could wonder about the necessity of classifying Sweden as a 'high risk' country, despite the fact that the numbers were barely above the relevant threshold and that a downward trend was already noticeable, while eventually lifting the restrictions two days later. Such a zealous application of the rules, questionable from the point of view of legal certainty, was maybe not called for. However, it does not call into question, in my view, the legitimacy of the system in itself.

court to verify whether the relevant decrees featured a 'sunset clause', providing for their termination on a certain date or, at least, whether the Belgian authorities were keeping track of the evolution of the threat justifying them.

115. Secondly, the referring court should also verify whether the procedural safeguards laid down in Articles 30 and 31 of the Citizenship Directive were in place. While, as I indicated in point 73 above, those provisions were not drafted with general measures such as the ones at issue in mind, those safeguards still applied. Indeed, they were intended to 'ensure a high level of protection of the rights of Union citizens' in case of restrictions to their freedom of movement, as well as to 'uphold the principle that *any action* taken by the authorities must be properly justified'.[160] The safeguards in question constitute, moreover, a specific expression of the principle of effective judicial protection guaranteed in Article 47 of the Charter – which is all the more reason why they should have a broad scope. That said, I agree with the Belgian Government and the Commission that some adaptations are necessary in the present case.

116. On the one hand, with regard to the obligations to 'notify in writing' the 'decision' restricting free movement to the 'person concerned' and to provide that person with the information about the grounds on which that 'decision' was adopted, laid down respectively in Article 30(1) and (2) of the Citizenship Directive, it is obvious that the contested travel restrictions could not have been so notified, and that information provided, on an individual basis, to all persons who fell within their scope. Nevertheless, the protection offered by those safeguards had to be adequately guaranteed. As the Belgian Government argued during the hearing, the fact that information concerning the adoption of those restrictions and the 'public health' grounds on which they were based had been frequently shared with the general public through various forms of large-audience media satisfies, in my view, that requirement.[161]

117. With respect, on the other hand, to the obligation to give Union citizens access to judicial redress procedures to appeal against or seek review of any 'decision' restricting their right to freedom of movement, laid down in Article 31(1) of the Citizenship Directive, it does not mean, in my view, that Union citizens should have had the right to challenge *directly* general measures such as those at issue if such a possibility did not exist under national law. Indeed, that provision must, in my view, be read in the light of Article 47 of the Charter and of the essential requirements stemming from it.[162] I recall that the principle of effective judicial protection guaranteed therein does not require it to be possible, as such, to bring a free-standing action to dispute the compatibility of national provisions with EU law, provided that one or more legal remedies exist, which make it possible to ensure, *indirectly*, respect for an individual's rights under EU law.[163]

118. There are several ways in which Belgian courts could have ensured judicial protection of the rights that Union citizens derive from the Citizenship Directive during the pandemic. First, any action by, for example, the police authorities refusing, on the basis of the contested travel restrictions, to allow a given person to board a flight, or imposing a penalty for attempting to do so, would have qualified, in itself, as a 'decision', within the meaning of Article 31(1) of that directive,[164] and should accordingly have been open to judicial review. In that context, the person concerned should have had the opportunity to raise, as a preliminary issue, the question of the

160 Recital 25 of the Citizenship Directive (emphasis added).

161 See also, to that effect, Article 34 of the Citizenship Directive.

162 See, to that effect, judgment of 4 June 2013, *ZZ* (C-300/11, EU:C:2013:363, paragraph 52).

163 See judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraphs 47 to 64).

164 See, by analogy, judgment of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 15).

compatibility with EU law of the general measures on the basis of which that 'decision' had been taken. Secondly, it was evidently possible – since Nordic Info brought such a claim – to do so in the context of a claim for damages against the State. [165]

119. In the context of those redress procedures, a Union citizen should have been able not only to challenge the overall compatibility of those measures with EU law, but also to claim that they should not have been enforced against him or her. That person should have been able to submit, for instance, that he or she was wrongly refused the right to board his or her flight, when he or she was travelling for an 'essential' purpose. Courts should have been able to review, for instance, whether the authorities were entitled to take the view that the trip in question, although family related, did not fall within the 'imperative family reasons' category, [166] or whether that person's very specific individual circumstances should have justified, beyond those general categories of travel regarded as 'essential', an exceptional derogation from the travel ban. [167]

(iii) The strict proportionality of the contested travel restrictions

120. Proportionality *sensu stricto* entails an assessment of the disadvantages caused by a given measure, and of whether those disadvantages are proportionate to the aims pursued. [168] That requirement was largely ignored by the intervening governments and the Commission in their submissions. They may be forgiven for that omission, however, for that step of the proportionality test is generally absent from the 'traditional' case-law of the Court on free movement. [169] By contrast, it features relatively consistently in its decisions relating to the legality of national measures that limit the exercise of the fundamental rights guaranteed by the Charter, under Article 52(1) thereof. [170] In that context, the Belgian Government and the Commission were asked by the Court, during the hearing, whether the referring court should, in fact, also verify the strict proportionality of the contested travel restrictions. Those interveners conceded that it should do so. I am also convinced that it is the correct approach, for the following reasons.

121. Measures restricting the free movement of persons raise, generally speaking, issues involving fundamental rights. Besides the fact that the right to free movement enjoyed by Union citizens is, in itself, protected in the Charter, [171] national measures that restrict that right usually limit, at the same time, other rights and freedoms guaranteed therein. That is certainly the case here. The contested travel restrictions, by hindering movement between Member States, may have, depending on the circumstances, limited (i) the right to private and family life protected in

165 See, by analogy, judgment of 13 March 2007, *Unibet* (C-432/05, EU:C:2007:163, paragraphs 56 to 64).

166 See point 88 above

167 See point 132 below.

168 See, inter alia, judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 64 and the case-law cited).

169 See, inter alia, with regard solely to appropriateness and necessity, judgments of 14 July 1983, *Sandoz* (174/82, EU:C:1983:213, paragraph 18); of 10 July 2008, *Jipa* (C-33/07, EU:C:2008:396, paragraph 29); and of 16 March 2023, *OL (Extension of Italian licences)* (C-517/20, not published, EU:C:2023:219, paragraph 53).

170 See, inter alia, judgments of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28, paragraph 50); of 15 February 2016, *N.* (C-601/15 PPU, EU:C:2016:84, paragraph 54); and of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 64).

171 I emphasise that the Charter is applicable in a situation such as that at issue in the main proceedings. Indeed, when Member States restrict the right to free movement enjoyed by Union citizens and seek to rely on the grounds provided under EU law, such as Article 27(1) of the Citizenship Directive, to justify such a restriction, they are 'implementing Union law', within the meaning of Article 51(1) of the Charter. See, inter alia, judgment of 21 May 2019, *Commission* v *Hungary (Usufruct over agricultural land)* (C-235/17, EU:C:2019:432, paragraphs 63 and 64 and the case-law cited).

Article 7 (to the extent that they could, notably, have kept families apart),[172] (ii) the right to education protected by Article 14 (to the extent that they could prevent, for instance, students from attending courses in a foreign university), (iii) the right to work guaranteed in Article 15, (to the extent that they could prevent people from seeking employment abroad) and (iv) the freedom to conduct a business protected in Article 16 (notably, because they made the provision of tourist services in relation to the 'high risk' countries concerned virtually impossible).

122. In such situations, the conditions for derogation from the right to free movement, as provided in Article 27(1) of the Citizenship Directive, must be interpreted in a manner which complies with the requirements flowing from the Charter. Indeed, that provision cannot tolerate restrictions on the free movement of persons that would not be permissible under Article 52(1) of the Charter. It follows, in my view, that the proportionality test should be as stringent under the first provision as it is under the second one.

123. Indeed, there is a significant difference, in terms of the protection of fundamental rights, between the various steps of the proportionality test. The requirements of 'appropriateness' and 'necessity' are solely concerned with the *efficiency* of the measures in question in relation to the objective pursued. It is, ultimately, no more than a limited judicial review of whether the authorities assessed the factual situation in a reasonably correct manner in that regard. Furthermore, that review is heavily dependent on abstract considerations such as the 'level of protection' of the interest in question that the public authorities sought to achieve. As I have already stated, the higher that level of protection, the more 'necessary' restrictive measures will appear to be, even particularly drastic ones. However, some measures, as 'necessary' as they may be for the purposes of safeguarding certain interests, are simply too taxing on other interests to be acceptable in a democratic society. That is precisely the point of the requirement of 'proportionality *sensu stricto*'. Under that requirement, the advantages resulting from the contested measures in relation to the objective pursued are weighed against the disadvantages they cause in relation to fundamental rights.[173] As Advocate General Saugmandsgaard Øe observed in his Opinion in *Tele2 Sverige and Others*,[174] that balancing exercise 'opens a debate about the values that must prevail in a democratic society and, ultimately, about what kind of society we wish to live in'. That debate is necessary, even in relation to 'public health' measures[175] and, I would add, particularly so in relation to measures taken during the COVID-19 pandemic, given their unprecedented impact on the entire population of the Member States.[176]

124. Turning now to the strict proportionality of the contested travel restrictions, I would observe that, as indicated before, on the one hand, those measures limited, depending on the circumstances, various fundamental rights and freedoms protected under the Charter. On the other hand, they seemed appropriate and necessary to pursue an objective of general interest recognised by the Union, namely the protection of public health. Furthermore, as the Belgian and

172 Similarly, while freedom of movement is guaranteed as such under Article 2 of Protocol No 4 to the ECHR, the ECtHR considers it also as an important aspect of a person's right to respect for his or her private life, as guaranteed by Article 8 of that convention. See, inter alia, ECtHR, 6 December 2005, *İletmiş v. Türkiye* (CE:ECHR:2005:1206JUD002987196, § 47). Says Turkey on Hudoc

173 Similarly, faced with a measure restricting the right of exit guaranteed in Article 2(2) of Protocol No 4 to the ECHR, the ECtHR examined whether that measure strikes a fair balance between the public interest and the individual's rights. See, inter alia, ECtHR, 23 February 2017, *De Tommaso v. Italy* (CE:ECHR:2017:0223JUD004339509, § 104).

174 Opinion in Joined Cases C-203/15 and C-698/15, EU:C:2016:572, point 248.

175 See European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP)), § 46 et seq., and Council of the EU, Declaration by the High Representative Josep Borrell, on behalf of the European Union, on human rights in the times of the coronavirus pandemic, 5 May 2020.

176 The degree to which fundamental rights had to be protected may have varied under an exceptional, 'state of emergency' regime, in accordance with Article 347 TFEU. However, I will not address that issue in the present Opinion for the reasons given in points 51 to 54 above.

Norwegian Governments point out, the implementation of such measures was required to protect the 'right to health' of the national populations, which is recognised in numerous international instruments to which Member States are parties, and which imposes on them positive obligations to take appropriate steps to, in particular, control epidemic diseases.[177] In that context, a 'fair balance' had to be maintained between those various rights and interests.[178]

125. Obviously, maintaining such a balance was no easy exercise. Keeping the pandemic under control while limiting the impact of the sanitary measures on civil liberties was, undoubtedly, a complex task. Public authorities had to make many political, economic and social choices, and rather quickly, given the rapidly evolving situation they were facing. In fact, it was probably one of the greatest challenges that public authorities have had to face in recent history.

126. Weighing the advantages and disadvantages of travel restrictions such as those at issue was particularly difficult. On the one hand, such measures could help to limit the spread of COVID-19. On the other hand, they were capable of causing significant social and economic disruption.[179]

127. First, travel restrictions had a tremendous impact on business and the related freedom guaranteed under Article 16 of the Charter. In particular, the consequences for the tourism sector were unprecedented. Due to those restrictions, the operations of, inter alia, tour operators, such as Nordic Info, generally came to a standstill.[180] Nonetheless, in weighing competing values, public authorities could, in my view, reasonably take the view that public health should prevail over such economic considerations[181] and/or that an uncontrolled pandemic could have even more serious consequences on the economy in the long run, if temporary measures were not taken to limit its spread. In addition, other measures were adopted, at EU and national level, to mitigate the impact of those restrictions on the sector in question.[182]

128. Secondly, travel restrictions entailed significant disadvantages for individuals. Those disadvantages weigh heavily on the heart of the EU lawyer since those measures had the greatest impact on the 'cherished child' of EU law, namely the mobile Union citizen. The status in

177 See, inter alia, Article 12(2)(c) of the International Covenant on Economic, Social and Cultural Rights, 1966, and Article 11(3) of the European Social Charter (Revised), signed in Strasbourg on 3 May 1996. Furthermore, pursuant to the settled case-law of the ECtHR, although the 'right to health' is not guaranteed as such under the ECHR, positive obligations in health matters nevertheless stem from Articles 2 and 8 ECHR (right to life and right to respect for private and family life, respectively). Notably, Article 2 of that convention imposes on States parties a positive obligation to take appropriate steps to safeguard the lives of those within their jurisdiction and to protect their physical integrity, including in the public-health sphere (see, notably, ECtHR, 5 November 2020, *Le Mailloux v. France* (CE:ECHR:2020:1105DEC001810820, § 9 and the case-law cited). Under EU law, such positive obligations also stem, in my view, from Article 2(1) of the Charter – as the 'right to life' guaranteed therein corresponds to that set out in Article 2 ECHR – and from the first sentence of Article 35 of the Charter.

178 As a side note, I recall that, pursuant to Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms guaranteed therein must also respect the 'essence' of those rights and freedoms and that, when that is not the case, such a balancing of interests is not possible. However, I do not think that the contested travel restrictions infringed the 'essence' of the right to free movement, as guaranteed in Article 45(1) of the Charter, or of the other fundamental rights involved. While, notably, a travel ban is the most severe form of restriction to the right to freedom of movement, the fact that that ban was not absolute is decisive in that regard. Indeed, it applied only to travel to and from certain 'high risk' countries; 'essential' travel was excluded from its scope; and, it was imposed only temporarily (see, *a contrario*, judgment of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraphs 44 and 79)).

179 See ECDC Guidelines, pp. 18 and 19.

180 See, inter alia, World Economic Forum, 'This is the impact of COVID-19 on the travel sector' (https://www.weforum.org/agenda/2022/01/global-travel-tourism-pandemic-covid-19/), and Opinion of Advocate General Medina in *UFC – Que choisir and CLCV* (C-407/21, EU:C:2022:690, points 1 and 2).

181 See European Council, Conclusions by the President of the European Council following the video conference with members of the European Council on COVID-19, 17 March 2020.

182 See, for the various measures proposed around the material time by the Commission in that regard, 'Tourism and transport: Commission's guidance on how to safely resume travel and reboot Europe's tourism in 2020 and beyond', Press release, 13 May 2020.

question, and the right to free movement associated with it, was conceived as a means of emancipating individuals, through study, work, making friends, creating family ties, and so on, across the European Union. It came with a lifestyle: for many of such citizens, international travel is an essential part of life. Suddenly, the very mobility fostered by the European Union was seen as a threat and curtailed accordingly. [183]

129. That being said, it is clear that, generally speaking, travel restrictions may have a disparate impact on Union citizens, depending on the circumstances. For instance, preventing a person from returning home and/or from being reunited with his or her loved ones in a different country encroaches on that person's fundamental right to privacy and family life more so than simply preventing him or her from going on a tourist trip to Sweden. That is why, usually, the strict proportionality of such measures must be assessed *in concreto*, in view of the individual circumstances of the persons affected. [184]

130. I have explained in point 70 above that, when it comes to travel restrictions adopted in response to the threat posed by an epidemic disease, such an individual assessment would often not be possible without compromising the efficacy of such restrictions. General measures may be adopted in that regard. However, in that hypothesis, an *in abstracto* proportionality assessment must be carried out, by distinguishing different categories of persons and circumstances, to account for the fact that some reasons for travel deserve more protection than others and must prevail over the requirements of public health. [185]

131. The Belgian Government submitted at the hearing, in reply to questions put to it by the Court, that the contested travel restrictions proceeded from that logic. In particular, it was to ensure the strict proportionality of those measures that people travelling for 'essential' purposes, especially for 'imperative family reasons', were left outside their scope.

132. In my view, assuming that the general categories of 'essential' travel were understood broadly enough to satisfy the requirements of, inter alia, the fundamental right to private and family life, and that the evidence needed to show that a trip was 'essential' was not such as to make it, in practice, excessively difficult to travel, [186] this indeed contributed to ensuring the strict proportionality of the contested measures. [187] However, in addition to those general categories, the contested measures should also, in my view, have been flexibly enforced. Other, specific individual circumstances should have justified exceptional derogations at the time of enforcement. People who were temporarily staying in Belgium should have been allowed to return to their Member State of residence, be it Sweden or another 'high risk' country. [188] Some other humanitarian circumstances could, and should, also have justified such a derogation on grounds of fundamental rights. That is for the referring court to verify.

183 See Iliopoulou-Penot, A., 'La Citoyenneté de l'Union aux temps du coronavirus', in Dubout, E., and Picod, F. (eds), *Coronavirus et droit de l'Union européenne*, Bruylant, 2021, pp. 178 to 180.

184 See, by analogy, judgment of 29 April 2004, *Orfanopoulos and Oliveri* (C-482/01 and C-493/01, EU:C:2004:262, paragraphs 93 to 99), and ECtHR, 8 December 2020, *Rotaru v. the Republic of Moldova* (CE:ECHR:2020:1208JUD002676412, § 31 and the case-law cited).

185 See, notably, Thym, D., and Bornemann, J., op. cit., pp. 1164 and 1165.

186 See, by analogy, with respect to the category of travel related to 'imperative family reasons', European Commission, 28 October 2020, Communication from the Commission to the European Parliament, the European Council and the Council – COVID-19 – Guidance on persons exempted from the temporary restriction on non-essential travel to the EU as regards the implementation of Council Recommendation 2020/912 of 30 June 2020 (COM(2020) 686 final), p. 8.

187 See, for a similar assessment under the ECHR, McBride, J., 'An Analysis of Covid-19 Responses and ECHR Requirements', ECHR Blog, 27 March 2020 (available at https://www.echrblog.com/2020/03/an-analysis-of-covid-19-responses-and.html).

188 See, inter alia, European Commission, 16 March 2020, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, § 21.

133. By contrast, public authorities could reasonably consider that travel for tourism purposes, important as though might be, had to give way temporarily to the requirements of public health. Furthermore, in that respect, it must be borne in mind that the restrictions at issue applied only in relation to certain 'high risk' countries while tourist trips to other countries were allowed. That also contributed to the strict proportionality of the contested measures.

6. Interim conclusion

134. In light of the foregoing considerations, I suggest that the Court answer the first question to the effect that Article 4(1) and Article 5(1), read in conjunction with Article 27(1) and Article 29(1), of the Citizenship Directive must be interpreted as meaning that they do not preclude, in principle, national measures, implemented in response to the serious and genuine threat to public health posed by a pandemic, consisting in, on the one hand, a travel ban to and from countries where the epidemiological situation is comparably worse than that prevailing in the Member State in question and, on the other hand, quarantine and testing requirements for residents upon their return from such countries.

B. The legality of the checks carried out to enforce the contested travel restrictions (second question)

135. Before the referring court, Nordic Info alleges that, in order to enforce the travel restrictions that were discussed in my analysis of the first question, the Belgian authorities carried out, at the material time, checks at the borders between Belgium and other Schengen States, in breach of the rules of the Schengen Borders Code.

136. I recall that, in order to implement the European Union's objective of creating 'an area … without internal frontiers, in which the free movement of persons is ensured',[189] the Schengen Borders Code provides for the *principle* of the absence of border control of persons crossing the 'internal borders'[190] between the countries to which the Schengen *acquis* applies, such as Belgium and Sweden.[191] Article 22 of that code expresses that principle by providing that internal borders may be crossed at any point without a border check on persons being carried out. However, by way of *exception*, Articles 25 to 35 of the same code allow, under certain conditions, for the temporary reintroduction of such checks.

137. Here, Nordic Info claims that the contested checks were carried out in breach of Article 22 of the Schengen Borders Code. Furthermore, in its view, the conditions for an exceptional reintroduction of border control at internal borders, as provided in Article 25 et seq. of that code, were not fulfilled.

138. In the order for reference, the national court seems to start from the premiss that the checks carried out by the Belgian authorities indeed constituted 'border checks' within the meaning of Article 22 of the Schengen Borders Code and, accordingly, seems to wonders about their lawfulness under Article 25 et seq. of that code only. However, the Belgian Government disputes

189 See point 4 above.

190 Pursuant to Article 2(1) of the Schengen Borders Code, for the purpose of that code, the concept of 'internal borders' refers to '(a) the common land borders, including river and lake borders, of the Member States; (b) the airports of the Member States for internal flights; (c) sea, river and lake ports of the Member States for regular internal ferry connections'.

191 As well as Iceland and Norway, if it were to be relevant for the purposes of the case in the main proceedings (see footnotes 23 and 35 above).

that premiss in its submissions. Furthermore, the second question is formulated in a broad and open manner, potentially also covering that issue. Therefore, I consider it appropriate to provide some clarifications regarding the characterisation of the contested checks (1), before examining the conditions for temporary reintroduction of border control at internal borders (2).

1. The characterisation of the contested checks

139. The request for a preliminary ruling is vague with regard to the checks carried out by Belgian authorities in order to enforce the contested travel restrictions at the material time. The referring court explains only – and recalls in the formulation of its second question – that the travel ban provided in Article 18 of the contested decree [192] was 'checked and sanctioned' in case of breach, and that it could be 'enforced *ex officio*' by the competent authorities. For the rest, that court reproduces the content of some of the relevant provisions of Belgian law, without explaining what they entailed in practice. Be that as it may, the following elements arise from the case file and, in particular, from the answers provided by the Belgian Government to questions put to it by the Court.

140. On the one hand, it is not disputed that, at the material time, the Belgian authorities had not formally reintroduced border control at the internal borders that Belgium shares with other Schengen countries, pursuant to Article 25 et seq. of the Schengen Borders Code. On the other hand, some checks were carried out at that time by police officers, specifically:

– at airports, concerning, in principle, all flights. However, with respect to flights arriving from 'high risk'/'red' Schengen countries, random checks were carried out on passengers;

– at railway stations, with officers carrying out random checks on passengers on international high-speed trains arriving from neighbouring countries, at the time of disembarkation at the first station at which those trains stopped after entering the Belgian territory;

– on roads crossing the borders, with mobile units of officers carrying out random checks during their normal working hours.

141. In the Belgian Government's view, those checks were not 'borders checks' within the meaning of Article 22 of the Schengen Borders Code. They were merely instances of the 'exercise of police powers by the competent authorities of the Member States under national law … in border areas' and, furthermore, did not have an 'effect equivalent to border checks' within the meaning of Article 23(a) of that code. Therefore, they did not fall under the prohibition of border control at internal borders, as that last provision makes clear.

142. The proper characterisation of the contested checks is, obviously, an issue that should be determined by the referring court. In order to guide that court in that regard, I will nevertheless make a few observations.

143. On the one hand, the contested checks could, at first sight, seem to satisfy the definition of 'border checks' provided in Article 2(11) of the Borders Schengen Code. First, they were apparently 'carried out at border crossing points' or close to those points – at least as far as roads

[192] It would appear that the enforcement of the quarantine and testing requirements is not at issue.

and airports were concerned,[193] although the case of railway stations is not that different.[194] Secondly, they were arguably carried out 'to ensure that persons … may be authorised to enter the territory of [a Member State] or authorised to leave it', as it would appear that police officers were verifying that travellers fulfilled at least one of the conditions imposed at the material time to 'be authorised to enter' or 'to leave' the Belgian territory – namely travelling for an 'essential purpose' or, alternatively, not arriving from, or attempting to leave for, a 'high risk' country.

144. On the other hand, the fact that the contested checks were apparently carried out not in fixed installations, but rather by mobile units of police officers present in different locations at various times, together with the fact that those checks were not systematic,[195] but random 'spot-checks', are strong indicators[196] that they were, as the Belgian Government claims, instances of the 'exercise of police powers … in border areas' as per Article 23(a) of the Schengen Borders Code. Provided that the intensity and frequency of those checks – which should be verified by the referring court on the basis of the relevant rules of Belgian law – were not such that they had an 'effect equivalent to border checks', they were indeed not covered by the prohibition laid down in Article 22 of that code.[197] The fact that Article 23(a) envisions only, at point (ii), checks carried out in response to 'threats to public security', and not 'threats to public health' is irrelevant in that respect. Indeed, that provision neither provides a legal basis nor defines the reasons for which 'police powers' may be exercised – as those reasons are defined in the relevant national law – and the scenario of public security related controls is given merely as an example.[198]

2. The conditions for the temporary reintroduction of border control at internal borders

145. I have explained, in the previous section, why, in my view, subject to verification by the referring court, checks such as those carried out, at the material time, by the Belgian authorities to enforce the contested travel restrictions did not constitute prohibited 'border checks' at internal borders within the meaning of Article 22 of the Schengen Borders Code. Accordingly,

193 I recall that, for the purposes of the Schengen Borders Code, the airports of the Member States are regarded as border crossing points. See, to that effect, the definitions of 'internal borders' and of 'external borders' in Article 2, respectively points 1 and 2 of that code.

194 On the one hand, even in relation to international trains, railway stations are not regarded as border crossing points for the purposes of the Schengen Borders Code (see, to that effect, the definitions of 'internal borders' and of 'external borders' in Article 2, respectively points 1 and 2, of that code). On the other hand, under the rules of that code, 'border checks' are to be carried out, on passengers of trains crossing the external borders, when disembarking (or boarding), at the first railway station of arrival (or last station of departure) on the territory of a Schengen State. See Annex VI 'Specific rules for the various types of border and the various means of transport used for crossing the Member States' external borders', point 1 ('Land borders'), point 1.2 ('Checks on rail traffic').

195 It seems that the only checks carried out systematically concerned the passengers boarding or disembarking the *Eurostar* trains arriving from or leaving for London (United Kingdom), at Midi railway station in Brussels (Belgium). However, those checks are not relevant for the purposes of the present case. Indeed, as the Belgian Government emphasised at the hearing, they concern the crossing not of an 'internal border', but of the 'external borders' of the Schengen States. As those trains are obviously not stopped, in the middle of the Channel Tunnel, at the virtual border between France and the United Kingdom, passengers are, instead, checked before boarding or disembarking at Midi railway station (see footnote 193 above). The fact that those trains sometimes stop in the territory of the Schengen States between Brussels and London is irrelevant in that regard. In fact, a specific regime applies in that respect, under which the passengers boarding those trains, for instance, in Lille (France) for Brussels, are to be subject to 'border checks' at the station of destination (see Annex VI, point 1.2.3 of the Schengen Borders Code). I emphasise that, with respect to those passengers, the checks in question are not considered to be related to the crossing of an 'internal borders'. Instead, those persons are regarded, through a legal fiction, as having crossed the 'external borders' of the Schengen States.

196 See, to that effect, Article 23(a)(iii) and (iv) of the Schengen Borders Code.

197 See, to that effect, judgment of 21 June 2017, *A* (C-9/16, EU:C:2017:483, paragraphs 38 to 40 and the case-law cited).

198 As the use of the expression 'in particular' in Article 23(a) makes clear.

the issue of whether the conditions for an exceptional reintroduction of border control at those borders were fulfilled in Belgium at that time no longer seems relevant. However, I will address it for the sake of completeness. [199]

146. Article 25(1) of the Schengen Borders Code lays down the general framework governing the temporary reintroduction of border control at internal borders. It provides, in particular, that that control may be reintroduced 'where … there is a serious threat to public policy or internal security' in a Member State. Other procedural and substantive conditions need to be fulfilled, as I will explain below. [200]

147. However, irrespective of whether those other conditions were fulfilled at the material time in Belgium, Nordic Info claims that the reintroduction of border control was clearly not possible in circumstances such as those at issue in the main proceedings, for the simple reason that Article 25(1) of the Schengen Borders Code does not refer to 'public health' as a justification for such a measure. That issue is, as it follows from the order for reference, at the heart of the referring court's second question. Accordingly, I will first discuss, in the abstract, the scope of that provision (a), before making some brief remarks as to whether the conditions for the implementation of such a measure were fulfilled in the circumstances at issue (b).

(a) The scope of Article 25(1) of the Schengen Borders Code

148. In my view, Nordic Info's argument concerning the grounds on which border control at internal borders may lawfully be reintroduced under Article 25(1) of the Schengen Borders Code carries some weight. [201]

149. Indeed, where Article 27(1) of the Citizenship Directive expressly lists 'public policy, public security or public health' (emphasis added) as permissible grounds for restricting free movement, Article 25(1) of the Schengen Borders Code refers, when it comes to border control at *internal* borders, to 'serious threat to public policy or internal security' only, apparently leaving 'public health' aside. The prevention of 'threats to public health' of the Member States is, in fact, mentioned in that code, but only in relation to the entry of third-country nationals arriving at the *external* borders. [202]

150. Furthermore, an analysis of the history of that code tends to indicate that that difference of regime is not a mere omission, but a deliberate choice of the EU legislature. In that regard, I recall that the Convention implementing the Schengen Agreement, [203] signed at Schengen on 19 June 1990, [204] referred to 'public health' neither in relation to the entry condition of aliens nor

[199] Those developments may turn out to be, at least, instructive for other cases since, as indicated in the introduction to this Opinion, Member States have reintroduced border control on a large scale at internal borders at various points in time during the pandemic. See Member States' notifications of the temporary reintroduction of border control at internal borders pursuant to Article 25 and 28 et seq. of the Schengen Borders Code (available at https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area/temporary-reintroduction-border-control_en).

[200] See points 155 to 161 below.

[201] So much so that its view is, or at least was, apparently shared by the Parliament. See European Parliament, resolution of 19 June 2020 on the situation in the Schengen area following the COVID-19 outbreak (2020/2640(RSP)) (OJ 2021 C 362, p. 77), paragraph 7.

[202] Not to be 'a threat to public policy, internal security [or] *public health*' (emphasis added) is one of the entry conditions, applicable to third-country nationals, for a short stay on the territory of the Member States (see Article 6(1)(e) of the Schengen Borders Code), which condition is, in principle, verified by border guards as part of the 'thorough' border checks to which third-country nationals are subject on entry in the Schengen Area (see Article 8(3)(a)(vi) of that code).

[203] Agreement between the Governments of the States of the Benelux Economic Union, The Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (OJ 2000 L 239, p. 13).

[204] OJ 2000 L 239, p. 19.

in relation to the temporary reintroduction of border control at internal borders.[205] Nevertheless, in its legislative proposal, which became the first version of the Schengen Borders Code,[206] the Commission proposed, inter alia, to add to the existing entry conditions that aliens should not constitute a threat to public health[207] and that border control could be reintroduced in the case of a 'serious threat to public policy, public policy or *public health*'.[208] However, during the first reading of the text, the European Parliament amended the provisions on border control at internal borders to the effect that all references to 'public health' threats was removed.[209] The amendment in question survived the rest of the legislative process.

151. That being said, like the Belgian, Norwegian and Swiss Governments, as well as the Commission, I take the view that, although 'threats to public health' cannot, by themselves, justify the reintroduction of border control at internal borders under Article 25(1) of the Schengen Borders Code, *some* public health-related situations are so severe that they can be subsumed under the concept of 'serious threat to public policy' used in that provision.[210]

152. While the concept of 'serious threat to public policy' is not defined in the Schengen Borders Code, it follows from recital 27 of that code that the EU legislature intended that the definition provided by the Court in its case-law on free movement should apply in that regard. Under the relevant case-law, the concept of 'public policy' presupposes the existence of 'a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society'.[211]

153. First, the protection of the population against harm, through, notably, the control of epidemic diseases, together with the provision of healthcare to that population, may easily be regarded as a part of those 'fundamental interests of society'. In fact, it may be one of the 'essential State functions' that the European Union must 'respect' pursuant to Article 4(2) TEU. Secondly, the risks posed by such diseases may, in certain circumstances, be severe enough to constitute a 'genuine, present and sufficiently serious threat' affecting those 'interests'.[212]

154. To the extent that, for example, a certain pandemic fulfils the definition of 'public policy' as recalled above, I see no reason to exclude it from the scope of Article 25(1) of the Schengen Borders Code. The wording of that provision is not qualified with respect to the type of 'threats to public policy' that may justify the reintroduction of border control at internal borders.

205 See, respectively, Article 2(2) and Article 5(1)(e) of the Convention implementing the Schengen Agreement.

206 Proposal for a Council Regulation establishing a Community Code on the rules governing the movement of persons across borders, presented by the Commission, 26 May 2004 (COM(2004) 391 final).

207 See Article 5(1)(e) of that proposal.

208 See Article 20(1), Article 22(1) and Article 24 of that proposal (emphasis added).

209 See European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (COM(2004)0391 – C6-0080/2004 – 2004/0127(COD)) (P6_TA(2005)0247). That amendment can be traced back to a proposal made by the Committee on Civil Liberties, Justice and Home Affairs. See Committee on Civil Liberties, Justice and Home Affairs, 14 April 2005, Amendments 138 to 198, Draft report, Michael Cashman, Doc nº PE 355.529v01-00, p. 20, Amendment 171 ('… There is … a difference between "threat to public health" as a reason to refuse the entry for an individual person and "threat to public health" as a reason to reintroduce internal border controls which would affect all persons wishing to cross the internal border. While for the first case it is easy to see the benefit of adding "threat to public health" as a grounds for refusal … this is not really evident for the reintroduction of internal border controls: should there be an outbreak of such a disease on the territory of a Member State the appropriate and proportional policy reaction would be, for example, to put the affected persons in quarantine, maybe seal-off a hospital or a few buildings').

210 See, for the same view, Commission, 16 March 2020, Covid-19 Guidelines for border management measures to protect health and ensure the availability of goods and essential services, paragraph 18.

211 See, inter alia, judgments of 4 December 1974, *Van Duyn* (41/74, EU:C:1974:133, paragraph 18), and of 4 October 2012, *Byankov* (C-249/11, EU:C:2012:608, paragraph 40).

212 See, to that effect, point 81 above. See also Leboeuf, L, 'La fermeture des frontières de l'Union pour motifs de santé publique: la recherche d'une approche coordonnée' in Dubout, E., and Picod, F. (eds), op. cit., pp. 223 to 239; van Eijken, H.H., and Rijpma, J.J., op. cit., p. 40, and Thym, D., and Bornemann, J., op. cit., pp. 1148 and 1149.

Provided that it is 'serious', *any* such threat is covered. The historical elements discussed above do not exclude, in my view, such an interpretation.[213] To clarify, this does not mean that 'public health' and 'public policy' coincide, and that the former may always justify such a measure. That would be the case only in the exceptional circumstances where the public health situation is severe enough to seriously threaten public policy.[214]

(b) Whether the conditions for the reintroduction of border control were fulfilled in the circumstances at issue

155. As the referring court does not really enquire whether the conditions for reintroduction of border control were fulfilled in the circumstances at issue and since, moreover, any clarifications on the matter are likely to be irrelevant for the main proceedings, I will limit myself to providing a few remarks on that aspect.

156. In the first place, as I have just explained, the reintroduction of border control at internal borders is justifiable, under Article 25(1) of the Schengen Borders Code, in response to a 'serious threat to public policy or internal security in a Member State'. As to whether the COVID-19 pandemic effectively constituted such a 'threat' at the material time, I recall points 76 to 86 above.

157. In the second place, it follows from Article 25(2) and Article 26 of the Schengen Borders Code that the implementation of such a measure must respect the principle of proportionality.[215]

158. First, as to whether the reintroduction of border control at internal borders is an *appropriate* remedy to the 'serious threat to public policy' that COVID-19 may have posed at the material time, I recall points 97 to 102 of this Opinion for a discussion on the (limited) effect of restrictions on international movements of persons on the spread of an epidemic disease. However, to the extent that travel restrictions such as those at issue were appropriate in that regard, it seems to me that the same is true of the reintroduction of border control at internal borders. Indeed, such a measure contributed (or could have contributed) to the enforcement of those restrictions and, thus, to their systematic and consistent application.

159. Secondly, whether the reintroduction of border control at the internal borders was *necessary* depends, in essence, on whether alternative measures would have been less restrictive, but equally effective, in enforcing the contested travel restrictions. In that respect, I would observe that random 'spot-checks' carried out in the territory, including in the border areas, accompanied by effective and dissuasive penalties in the event of breach of those measures, could probably have been a less restrictive, but equally effective, way of enforcing them – and indeed, it seems that it was the course of action specifically chosen by the Belgian authorities at the material time.[216]

[213] It is clear that the amendment was initially proposed for the reason indicated footnote 208 above. It is not clear, however, that the various members of the Parliament and of the Council accepted the amendment for that reason. They may very well have considered that a reference to 'public health' was not necessary, as a public health crisis severe enough to justify reintroducing border checks would be covered by the 'public policy' grounds.

[214] The same interpretation features, in essence, in the recent proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 14 December 2021 (COM(2021) 891 final). The Commission proposes, therein, to specify that a 'serious threat to public policy or internal security may be considered to arise from, in particular … large-scale public health emergencies' (see recital 28 and Article 25(1)(b) of the proposed regulation).

[215] Article 25(2) indicates that the reintroduction of border control at internal borders may only be 'a last resort' measure, while Article 26 provides that public authorities must verify 'the extent to which such a measure is likely to adequately remedy the threat to public policy or internal security', and 'the proportionality of the measure in relation to that threat'. Those conditions correspond, in my view, to the classic proportionality criteria of appropriateness, necessity and proportionality *sensu stricto*.

[216] See points 139 to 144 above.

160. Thirdly, as for the *strict proportionality* of the reintroduction of border control at internal borders, I recall my observations in points 120 to 133 above, for a discussion on the acceptability, in a democratic society, of restrictions on the international movements of persons on grounds of 'public health'. I would also add that, beyond the inconvenience posed by substantive travel restrictions, border checks bring, in themselves, certain disadvantages.[217] The border checks carried out by the Member States during the pandemic significantly hindered the movement of persons who were travelling for 'essential' purposes, and thus were not covered by travel bans, and for whom unhindered movement across borders was crucial. The impact of those checks on cross-border and healthcare workers was sometimes significant, especially where they resulted in long queues and considerable delays. The same is true of the movement of goods between borders. At the very least, to 'balance out' the possible advantages and disadvantages of border control, measures had to be put in place, such as the 'green lanes' system recommended by the Commission, to facilitate the flow of 'essential' persons and goods.[218]

161. Finally, I recall that a specific procedure has to be followed to reintroduce border control at internal borders. Notably, under Article 27 of the Schengen Borders Code, national authorities must notify their counterparts in the other Member States and the Commission at the latest four weeks before the planned reintroduction. Exceptionally, under Article 28, they may immediate reintroduce border control, while notifying that measure at the same time. Either way, notification is required. It would appear that not every Member State which implemented such a measure during the pandemic complied with that requirement.[219]

3. Interim conclusion

162. In the light of the foregoing considerations, I propose that the Court answer the second question to the effect that Article 25(1) of the Schengen Borders Code does not preclude, in principle, a Member State from temporarily reintroducing border control at internal borders in response to a pandemic, provided that it is severe enough to be characterised as a 'serious threat to public policy' within the meaning of that provision and that all the conditions set out therein are fulfilled.

[217] See, for a detailed analysis in that regard, European Commission, Directorate-General for Regional and Urban Policy, Peyrony, J., Rubio, J., and Viaggi, R., *The effects of COVID-19 induced border closures on cross-border regions: an empirical report covering the period March to June 2020*, Publications Office of the European Union, 2021.

[218] See European Commission, 24 March 2020, Communication from the Commission on the implementation of the Green Lanes under the Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ 2020 C 96I, p. 1), and 30 March 2020, Communication from the Commission – Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (OJ 2020 C 102I, p. 1).

[219] See, inter alia, Heinikoski, S., 'Covid-19 bends the rules on internal border controls: Yet another crisis undermining the Schengen *acquis*?', *FIIA Briefing Paper 281*, April 2020.

V. Conclusion

163. In the light of all the foregoing considerations, I propose that the Court answer the questions referred by the Nederlandstalige rechtbank van eerste aanleg Brussel (Brussels Court of First Instance (Dutch-speaking), Belgium)) as follows:

(1) Article 4(1) and Article 5(1), read in conjunction with Article 27(1) and Article 29(1), 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 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,

must be interpreted as meaning that they do not preclude, in principle, national measures, implemented in response to the serious and genuine threat to public health posed by a pandemic, consisting in, on the one hand, a travel ban to and from countries where the epidemiological situation is comparably worse than that prevailing in the Member State in question and, on the other hand, quarantine and testing requirements for residents upon their return from such countries.

(2) Article 25(1) of Regulation (EU) 2016/399 of the European Parliament and the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

must be interpreted as meaning that it does not preclude, in principle, a Member State from temporarily reintroducing border control at internal borders in response to a pandemic, provided that it is severe enough to be characterised as a 'serious threat to public policy' within the meaning of that provision and that all the conditions set out therein are fulfilled.