



GLIMSTEDT Bernotas & Partners
Jogailos str. 4, LT-01116 Vilnius, Lithuania
tel (+370 5) 2690700, fax (+370 5) 2690701
vilnius@glimstedt.lt www.glimstedt.lt

EFTA Surveillance Authority
Rue Belliard 35,
B-1040 Brussels
Belgium
Tel. (+32)(0)2 286 18 11, Fax.(+32)(0)2 286 18 00

Email: Registry@eftasurv.int

30 September 2016, Vilnius

COMPLAINT TO THE EFTA SURVEILLANCE AUTHORITY AGAINST FAILURE OF THE KINGDOM OF NORWAY TO COMPLY WITH EEA LAW

the enterprises of the European Union Member States which are engaged in the Barents sea crab catching activities (the "Complainants") hereby submit the complaint to the European Free Trade Association Surveillance Authority against secondary legislation of the Kingdom of Norway on the prohibition of snow crab (*chionoecetes opilio*) catching (the "Disputed secondary Legislation") and subsequent actions of the Kingdom of Norway authorities which infringe the fundamental principles of the Agreement on the European Economic Area (the "EEA Agreement").

The major effect of the Disputed secondary Legislation is the fact that it confers an unjustified privileged access to vessels owned by Norwegian citizens and Russian vessels to fishing of snow crab (*chionoecetes opilio*) in the maritime zones of Norway, in particular Svalbard Fisheries Protection Zone and Norwegian continental shelf. As long as the Disputed secondary Legislation is in effect it is not consistent with Articles 4, 31(1), 34, 36(1), 124 of the EEA Agreement and Article 5 of Protocol 9 of the EEA Agreement.

The structure of the complaint follows the Complaint Form¹ and Explanatory note to Complaint Form² published by the EFTA Surveillance Authority.

1.1. General information on the Complainants

1.Surname and forename of complainants:	
2.Where appropriate, represented by:	Managing partner, Attorney-at-law Egidijus Bernotas Senior Associate, Assistant Attorney-at-law Justinas Poderis Law firm GLIMSTEDT Bernotas & partners Jogailos str. 4, LT-01116 Vilnius Lithuania Tel. 8 5 269 07 00, Fax 8 5 269 07 01 Email: e.bernotas@glimstedt.lt
3.Nationality:	Complainants are enterprises registered in the European Union member states.

¹ EFTA Surveillance Authority website. Accessed August 18, 2016. <<http://www.eftasurv.int/internal-market-affairs/complaints/>>.

² EFTA Surveillance Authority website. Accessed August 18, 2016. <<http://www.eftasurv.int/internal-market-affairs/complaints/>>.

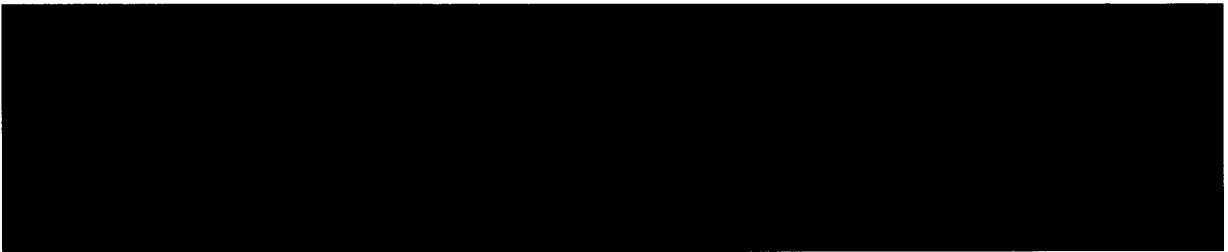
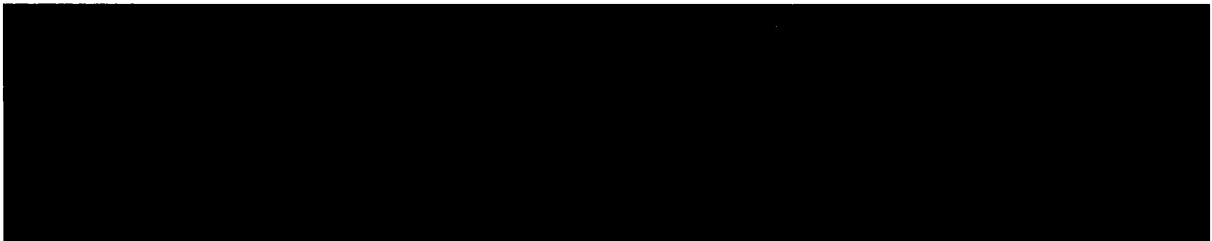


4.Address or registered office	
5.Telephone/fax/e-mail address:	
6.Field and place(s) of activity:	Territory of member states of the European Union and the European Free Trade Association
7.EFTA State or public body alleged by the Complainants not to have complied with EEA law:	The Kingdom of Norway

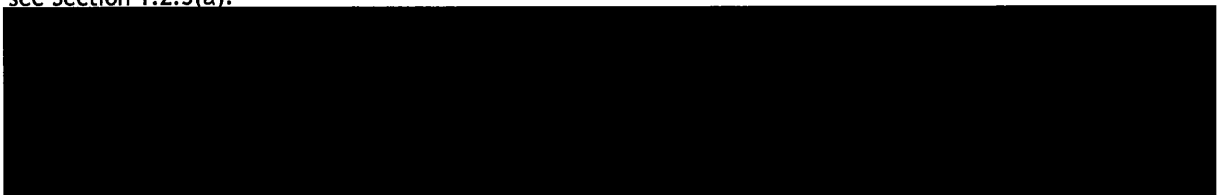
1.2. Fullest possible account of facts giving rise to complaint:

1.2.1. Norway actions against the Complainants

The Complainants are engaged in catching of snow crab (*chionoecetes opilio*) (the "crab") in international waters.



³ Until entry into force of the Provisions for prohibition of snow crab (*chionoecetes opilio*) catching of 2015, see Section 1.2.3(a).





1.2.2. Legal basis for catching of snow crab

(a) NEAFC Convention

In general, utilisation of the fishery resources of the North-East Atlantic area, including Norway's administered maritime zones, falls under the scope of the Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries¹⁰ (the "NEAFC Convention").

Article 1(1):

"The Convention Area" means the areas (see map in Annex 7):


(a) within those parts of the Atlantic and Arctic Oceans and their dependent seas which lie north of 36° north latitude and between 42° west longitude and 51° east longitude, but excluding:

(i) the Baltic Sea and the Belts lying to the south and east of lines drawn from Hasenøre Head to Griben Point, from Korshage to Spodsbjerg and from Gilbjerg Head to the Kullen. and

(ii) the Mediterranean Sea and its dependent seas as far as the point of intersection of the parallel of 36° latitude and the meridian of 5°36' west longitude

(b) within that part of the Atlantic Ocean north of 59° north latitude and between 44° west longitude and 42west longitude."

Pursuant to Article 7(e-f) of the NEAFC Convention, the North East Atlantic Fisheries Commission (the "NEAFC") has exclusive competence to establish binding total allowable catches within and their allocation to Contracting Parties of the NEAFC Convention also to regulate the amount of fishing effort as well as its allocation to Contracting Parties of the NEAFC Convention.



¹⁰ Adopted on 18 November 1980 and entered into force in 1982. It replaced the earlier 1959 North-East Atlantic Fisheries Convention.

(b) Svalbard treaty

Pursuant to the Treaty of Paris of 1920¹¹ (the "Svalbard treaty") Norway undertook the non-discrimination obligation towards persons of the contracting states, including EEA member states, concerning right to engage in fishing.

Article 1:

"The High Contracting Parties undertake to recognise, subject to the stipulations of the present Treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitsbergen, comprising, with Bear Island or Beeren-Eiland, all the islands situated between 10° and 35° longitude East of Greenwich and between 74° and 81° latitude North, especially West Spitsbergen, North-East Land, Barents Island, Edge Island, Wiche Islands, Hope Island or Hopen-Eiland, and Prince Charles Foreland, together with all islands great or small and rocks appertaining thereto <...>".

Article 2:

"Ships and nationals of all the High Contracting Parties shall enjoy equally the rights of fishing and hunting in the territories specified in Article 1 and in their territorial waters.

Norway shall be free to maintain, take or decree suitable measures to ensure the preservation and, if necessary, the reconstitution of the fauna and flora of the said regions, and their territorial waters; it being clearly understood that these measures shall always be applicable equally to the nationals of all the High Contracting Parties without any exemption, privilege or favour whatsoever, direct or indirect to the advantage of any one of them. <...>"

Article 3:

"The nationals of all the High Contracting Parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fjords and ports of the territories specified in Article 1; subject to the observance of local laws and regulations, they may carry on there without impediment all maritime, industrial, mining and commercial operations on a footing of absolute equality.

They shall be admitted under the same conditions of equality to the exercise and practice of all maritime, industrial, mining or commercial enterprises both on land and in the territorial waters, and no monopoly shall be established on any account or for any enterprise whatever.

Notwithstanding any rules relating to coasting trade which may be in force in Norway, ships of the High Contracting Parties going to or coming from the territories specified in Article 1 shall have the right to put into Norwegian ports on their outward or homeward voyage for the purpose of taking on board or disembarking passengers or cargo going to or coming from the said territories, or for any other purpose.

It is agreed that in every respect and especially with regard to exports, imports and transit traffic, the nationals of all the High Contracting Parties, their ships and goods shall not be subject to any charges or restrictions whatever which are not borne by the nationals, ships or goods which enjoy in Norway the treatment of the most favoured nation; Norwegian nationals, ships or goods being for this purpose assimilated to those of the other High Contracting Parties, and not treated more favourably in any respect."

Article 7:

¹¹ Treaty between Norway, The United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain and Ireland and the British Overseas Dominions and Sweden Concerning Spitsbergen Signed in Paris 9 February 1920.

“With regard to methods of acquisition, enjoyment and exercise of the right of ownership of property, including mineral rights, in the territories specified in Article 1, Norway undertakes to grant to all nationals of the High Contracting Parties treatment based on complete equality and in conformity with the stipulations of the present Treaty. <...>”

According to provisions of the Svalbard treaty cited above, all Parties to the Treaty are granted with an equal and non-discriminatory access to resources, in particular with respect to fishing activities, including fishing for sedentary species on the continental shelf around Svalbard archipelago.

(c) Murmansk treaty

Pursuant to covenants of the Murmansk treaty¹², the Joint Norwegian-Russian Fisheries Commission is charged with allocation of allowable catches.

(d) Framework of allocation of allowable catches

The European Union, the European Commission is charged with obligation to allocate allowable catches to the EU member states. In accordance with Article 16 of the Regulation (EU) No 1380/2013, the EU member states are free to allocate national allowable catches to undertakings within their jurisdiction. For instance, in Lithuania, undertakings apply to the Fisheries Service under the Ministry of Agriculture of the Republic of Lithuania (the “**Lithuanian Fisheries Service**”) for permission to fish non-quoted catches. In applications undertakings must indicate quantity, type of fish and the zone of water area.

Specifically, in relation to fishing for sedentary species as crab, as it was specified in the European Commission letter of 31 December 2015¹³ which was subsequently forwarded by the Lithuanian Fisheries Service¹⁴ to one of the Complainants [REDACTED] it was stated that:

“<...> In accordance with the provisions of Article 5(1) of the NEAFC Scheme of Control and Enforcement and of Article 5(1), last sentence, of Regulation (EU) No 1236/2010 the services of DG MARE will transmit to NEAFC the list of Union fishing vessels which are authorised to fish in the Regulatory Area of NEAFC in 2016.”

It is established principle of EU law that competence in relation to fisheries policy and registration which are retained by the Member States must be exercised consistently with the EU law.¹⁵

¹² The treaty on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. Signed in Murmansk 15 September 2010.

[REDACTED]

¹⁵ CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II*, ECR 1991 p. I-3905, paragraphs 14, 17.

1.2.3. The Disputed secondary Legislation

The legality of the following national secondary legislation of the Kingdom of Norway is challenged by the present complaint.

(a) Provisions for prohibition of snow crab (*chionoecetes opilio*) catching of 2015

The Provisions for prohibition of snow crab (*chionoecetes opilio*) catching¹⁶ of 2015 (see Exhibit CL11) establishes the general prohibition to fish for crab in the Norway's administered maritime zones and awards derogations from this prohibition to Russian vessels and vessels which have been granted permits in accordance with the Act on the Right to Participate in Fishing and Catching for commercial fishing outside territorial waters.

Article 1

*"Norwegian and foreign vessels are prohibited from catching snow crab (*chionoecetes opilio*) in Norway's territorial and internal waters and in the Norwegian continental shelf. Prohibition for Norwegian vessels is also valid in continental shelves of other countries. <...> The application to give an exceptional permit shall be sent to the Ministry of Trade, Industry and Fisheries. The Ministry of Trade, Industry and Fisheries can determine a limited number of vessels granted an exclusive right to catch in the zone of the Russian continental shelf 200 nautical miles from the Russian coast in the Barents Sea."*

Article 2

*"The vessels which have the issued permits to fish outside territorial waters in accordance with the Participation Act may be exempted from a prohibition to catch snow crab (*chionoecetes opilio*). If the permit is limited and is intended only for catching of certain species, exceptions can be made only where the permit includes catching of snow crab (*chionoecetes opilio*). Such an exception is applied at the time of catching in the continental shelf of other country only when there is an explicit consent of such country."*

Article 3

*"Despite the prohibition in the Article 1 Russian vessels may catch snow crab (*chionoecetes opilio*) in the zone of Norwegian continental shelf 200 nautical miles from the Russian coast in the Barents Sea."*

(b) The Act on the Right to Participate in Fishing and Catching

The Act on the Right to Participate in Fishing and Catching¹⁷ (the "Participation Act") grants exclusive rights to citizens or permanent residents of Norway to receive permits to engage in commercial fishing or catching. Also, the Participation Act prohibits use of fishing vessels, if majority of the crew are not citizens or permanent residents of Norway.

Article 4

"A vessel can be used for commercial fishing or catching only after a business permit was granted by the Department. They can impose the terms and conditions for receipt of such permit."

¹⁶ Adopted on 19 December 2014 by the Ministry of Trade, Industry and Fisheries and entered into force on 1 January 2015 and last amended on 22 December 2015.

¹⁷ Adopted on 26 March 1999 by the Department of Primary Industry and Fisheries and entered into force on 1 January 2000 and last amended on 19 June 2015, see Exhibit CL12.

A business permit shall be issued to the vessel owner and only for the vessel specified. A permit does not grant the right to swim on the other vessel. Another natural or legal person cannot use the permit that was granted to other person or vessel if the person himself was not granted a permit for commercial fishing or catching using a vessel.

A business permit grants the right to engage in fishing and catching in accordance with resolutions that are valid at any time or in accordance with the Act on Management of Wild Marine Living Resources, or in accordance with the present Act."

Article 5

"A business permit shall be issued exclusively for the citizens of Norway or the persons who have the same rights as the citizens of Norway. The foreigners who permanently reside in Norway shall be considered to be the persons who have the same rights as the citizens of Norway. The foreigners who permanently reside in Norway may obtain a business permit only when a length of the vessel is up to 15 meters.

The following companies and associations shall be considered to be equal to the citizens of Norway:

a. Joint-stock companies, partnerships and other companies with a limited liability when the main office and the Board of the company are based in Norway, when the majority of the Board and the chairman are the citizens of Norway residing in Norway and reside here for the past two years, also all shares of the company or at least 6/10 of the authorized capital must be owned by the citizens of Norway and the citizens of Norway must have at least 6 of 10 votes in the meetings of the Board.

b. The partial owners or other Norwegian company when its members have the unlimited liability for the company's obligations and when at least 6/10 part of the company is owned by the citizens of Norway.

c. The commandite partnership when at least 6/10 part of the authorized capital is owned by the citizens of Norway and when at least 6/10 part of the commandite capital is owned by the citizens of Norway.

The companies specified in this section have the same rights as the citizens of Norway, they are equal to the companies established by the government of Norway, institutions or funds and which are managed by the government of Norway or Norwegian municipalities."

Article 5 a.

"It is prohibited to use the vessels designed for commercial fishing or catching if less than a half of the crew, the fishermen and the captain do not reside in the municipality of that coast or the neighbouring coast. The requirement of the place of residence shall not be applied to the captain if he is the owner of the vessel. Exemptions may be granted only regarding the place of residence of the captain when he resides in other place of Norway, in the Nordic countries or in the EEA countries. <...>"

Article 6

"A permit for commercial fishing or catching may be issued only when a person has been engaged in commercial fishing or catching with a permit in the Norwegian vessel or with Norwegian vessel at least the last five years and continues to be strongly associated with a profession of commercial fishing or catching.

Companies or partnership can obtain a permit for commercial fishing or catching upon meeting all requirements specified in the first subparagraph when more than 50% of the company's shares are owned by the citizens of Norway and when the company is actually managed by the citizens of Norway."

It should be noted that until the adoption of the Provisions for prohibition of snow crab of 2015, provisions of the Participation Act were not enforced in order to prevent non-Norwegian nationals from other EEA member states from fishing, including catching of crab.

1.2.4. The effect of the Disputed Legislation

Because of the Disputed secondary Legislation, undertakings from EEA member states, except Norway and Russia, are prohibited from engaging in fishing and catching of crab in Norway's administered maritime zones.

The Disputed secondary Legislation directly discriminates on the basis of nationality against legal and natural persons from EEA member states, except Russian vessels, Norwegian citizens and permanent residents of Norway.

Due to the Disputed secondary Legislation, nationals from other EEA member states are prevented from establishing a company in Norway which could engage in commercial fishing or catching of crab. Moreover, the legal acts in question prevent nationals from acquiring capital of Norwegian companies that engage in fishing or catching of crab. Also, the Disputed secondary Legislation prevents legal and natural persons from EEA member states other than Norway to lease their ships or ship crews for purposes related to fishing or catching of crab.

In relation to whether the Disputed secondary Legislation constitutes a suitable and objectively justifiable measure, Complainants are not aware of any scientific study in support of the prohibition or limitation of catch of crab or justifying a differential treatment within or outside territorial waters.

In view of these considerations, the major effect of the Disputed secondary Legislation is the fact that it confers an unjustified privileged access to vessels owned by Norwegian citizens and Russian vessels to fishing of crab in the maritime zones of Norway, in particular Norwegian territorial waters and inland waterways as well as on the Norwegian continental shelf. As long as the Disputed secondary Legislation is in effect it is not consistent with Articles 4, 31(1), 34, 36(1), 124 of the EEA Agreement and Article 5 of Protocol 9 of the EEA Agreement.

1.3. The provisions of EEA law (EEA Agreement, Protocols, Acts referred to in Annexes to the Agreement) considered to have been infringed by the EFTA State concerned

It should be noted that according to the jurisprudence of the EFTA Court, while interpreting provisions of the EEA Agreement, due consideration shall be made in respect of the principle of homogeneity, which establishes a presumption that provisions framed in the same way in the EEA Agreement and in EU law are to be construed in the same way¹⁸. Furthermore, the EFTA Court has to pay due account to the jurisprudence of the Court of Justice of the European Union¹⁹ (the "CJEU"). Therefore, the Complainants hereby note relevant provisions of both EEA law and EU law.

¹⁸ EFTA Court. *Judgment of 26 June 2007, Case E-2/06 EFTA Surveillance Authority v. Norway*, EFTA Court Report, 164, Paragraph 59.

¹⁹ EFTA Court. *Judgment of 12 December 2003, Case E-1/03 EFTA Surveillance Authority v Iceland*, 2003 EFTA Court Report, paragraph 27.

1.3.1. Infringement of the principle of non-discrimination

Article 4 of the EEA Agreement establishes the principle of non-discrimination:

“Within the scope of application of this Agreement, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

Article 5 of the Protocol 9 of the EEA Agreement specifically prohibits discrimination of fishing vessels flying the flag of other EFTA member states:

“The Contracting Parties shall take the necessary measures to ensure that all fishing vessels flying the flag of other Contracting Parties enjoy access equal to that of their own vessels to ports and first-stage marketing installations together with all associated equipment and technical installations.”

Article 34 of the EEA Agreement provides non-discrimination obligation towards companies or firms formed in accordance with the law of an EU Member State or an EFTA State:

“Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.”

Article 124 of the EEA Agreement provides non-discrimination obligation towards nationals as regards participation in the capital of companies:

“The Contracting Parties shall accord nationals of EC Member States and EFTA States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 34, without prejudice to the application of the other provisions of this Agreement.”

In particular with regards to general prohibition for non-Norwegian (except for Russian) vessels to fish for crab as established in the Provisions for prohibition of snow crab of 2015, such prohibition infringes, as it was constituted in *R v Kent Kirk* case, the principle of equal conditions of access to and use of the fishing resources situated in the maritime zones administered referred to for all fishing vessels flying the flag of a EEA member state and registered in EEA territory²⁰.

The Disputed secondary Legislation which prevents non-Norwegian undertakings from other EEA member states to catch crab in Norway’s administered maritime zones clearly infringes the principle of non-discrimination as it is constituted in Articles 4, 34, 124 of the EEA Agreement and in Article 5 of the Protocol 9 of the EEA Agreement.

²⁰ CJEU. *Judgment of the Court of 10 July 1984, 63/83 Regina v Kent Kirk, ECR 1984, 2689, paragraph 7.*

1.3.2. Infringement of the right to establishment

Article 31(1) of the EEA Agreement²¹ establishes right of establishment:

“Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.”

It is well established within the EFTA Court jurisprudence that discriminatory national provisions which in effect prevent companies from other EEA member states to engage in particular economic activities are considered to infringe Article 31(1) of the EEA Agreement.

For instance, in the *Herbert Rainford-Towning* decision the EFTA Court stated that national provisions requiring that a managing director have his residence in Liechtenstein violate freedom of establishment and the principle of non-discrimination.²² The court ruled that the rules of equal treatment prohibit not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result.²³

In the *Dr Franz-Martin Pucher* case the EFTA Court maintained that the permanent residence requirement for person requesting approval to serve as the qualified board member of a Liechtenstein domiciliary company constituted a restriction on the freedom of establishment within the meaning of Article 31 of the EEA Agreement. The Court held that such a residence requirement has the effect of placing nationals of other EEA States engaged in the specified professions at a disadvantage compared with locals.²⁴

Furthermore, the EFTA Court has already held as indirect discrimination Norwegian legislation requiring Norwegian public entities to own at least two-thirds of the shares of the undertaking engaged in hydropower energy production.²⁵ Therefore, the restriction under Article 5(a) of the Participation Act requiring that the shares of the company or at least 6/10 of the authorized capital must be owned by the citizens of Norway so that it may apply for a permit to fish crab may deem to be indirect discrimination of nationals from other EEA member states.

The CJEU has already ruled in *Factortame II* case²⁶ that legislation which is similar to the provisions of the Participation Act infringe right to establishment. In *Factortame II* case the CJEU analyzed the United Kingdom legislation, which had established that a fishing vessel is eligible to fish in the maritime zones administered by the United Kingdom only if (i) the vessel is British-owned, if the legal title to the vessel is vested wholly in one or more qualified persons or companies and the vessel is beneficially owned by one or more qualified companies or, as to not less than 75%, by one or more qualified persons; (ii) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom; and (iii) any charterer, manager or

²¹ The same provision may be found in Article 49 of the Treaty on the Functioning of the European Union.

²² EFTA Court. *Judgment of 10 December 1998, Case E-3/98 Herbert Rainford-Towning, 1998 EFTA Court Report, 205, paragraph 30.*

²³ EFTA Court. *Judgment of 10 December 1998, Case E-3/98 Herbert Rainford-Towning, 1998 EFTA Court Report, 205, paragraph 27.*

²⁴ EFTA Court. *Judgment of 22 February 2002, Case E-2/01 Dr Franz-Martin Pucher, 2002 EFTA Court Report, 4, paragraphs 19, 21.*

²⁵ EFTA Court. *Judgment of 26 June 2007, Case E-2/06 EFTA Surveillance Authority v. Norway, EFTA Court Report, 164, Paragraph 66.*

²⁶ CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II, ECR 1991 p. I-3905.*

operator of the vessel is a qualified person or company; and (iv) "qualified person" means a person who is a British citizen resident and domiciled in the United Kingdom and "qualified company" means a company incorporated in the United Kingdom and having its principal place of business there, at least 75% of its shares being owned by one or more qualified persons or companies and at least 75% of its directors being qualified persons.²⁷

In view of such legislation, the CJEU ruled that the registration of vessels must not form an obstacle to freedom of establishment within the meaning of Article 49 of the Treaty on the Functioning of the European Union (the "TFEU")²⁸.

The CJEU in *Factortome II* case²⁹ constituted that as regards the right of establishment, in Article 49 of the TFEU, is concerned with differences of treatment as between natural persons who are nationals of Member States and as between companies who are treated in the same way as such persons by virtue of Article 54 of the TFEU. Specifically, the court concluded that a condition which stipulates that **where a vessel is owned or chartered by natural persons they must be of a particular nationality and where it is owned or chartered by a company the shareholders and directors must be of that nationality is contrary to Article 49 of the TFEU³⁰ as well as contrary to Article 55 of the TFEU, under which Member States must accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54 of the TFEU³¹.**

The CJEU subsequently held that requirement for the shareholders and directors to be resident and domiciled in the Member State in which the vessel is to be registered which is not justified by the rights and obligations created by the grant of a national flag to a vessel, results in discrimination on grounds of nationality:³²

"As for the requirement for the owners, charterers, managers and operators of the vessel and, in the case of a company, the shareholders and directors to be resident and domiciled in the Member State in which the vessel is to be registered, it must be held that such a requirement, which is not justified by the rights and obligations created by the grant of a national flag to a vessel, results in discrimination on grounds of nationality. The great majority of nationals of the Member State in question are resident and domiciled in that State and therefore meet that requirement automatically, whereas nationals of other Member States would, in most cases, have to move their residence and domicile to that State in order to comply with the requirements of its legislation. It follows that such a requirement is contrary to Article [49] of the [TFEU]."

Therefore, the Disputed secondary Legislation which prohibits other than Norwegian EEA nationals to use fishing vessels in the Norway's administered maritime zones, if majority of the crew are not citizens or permanent residents of Norway, or to establish companies that would fish for crab in Norway's administered maritime zones infringes prevents EEA nationals from purchasing fishing vessels in Norway and infringes the right to establishment as construed under Article 31(1) of the EEA Agreement and Article 49 of the TFEU.

1.3.3. Restrictions on the right to establishment are not justified

²⁷ CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II*, ECR 1991 p. I-3905, paragraph 6

²⁸ CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II*, ECR 1991 p. I-3905, paragraph 23.

²⁹ CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II*, ECR 1991 p. I-3905, paragraph 28.

³⁰ CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II*, ECR 1991 p. I-3905, paragraph 30.

³¹ CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II*, ECR 1991 p. I-3905, paragraph 31.

³² CJEU. *Judgment of the Court of 25 July 1991, Case C-221/89, Factortame II*, ECR 1991 p. I-3905, paragraph 32.

Article 33 of the EEA Agreement provides that:

The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.

The Disputed secondary Legislation does not provide special treatment of other EEA member states nationals on grounds of the public policy, public security or public health.

Also, it should be considered that the public security restriction on the right to establishment must only be justified when there is a genuine and sufficiently serious threat affecting fundamental interests of society.³³ As no such threat exists in relation to the Disputed secondary Legislation, the restriction on persons from other EEA member states to fish for crab is not legitimately justified.

1.3.4. Infringement of the freedom to provide services

Article 36(1) of the EEA Agreement provides that:

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

It is established principle of the EFTA Court jurisprudence that a measure that is liable to prohibit or otherwise impede the provision of services between EEA Contracting Parties as compared to the provision of services purely within one EEA Contracting Party constitutes an illegal restriction which is prohibited by Article 36(1) of the EEA Agreement.³⁴

Furthermore, the EFTA Court affirmed that Article 36 of the EEA Agreement requires not only the elimination of all discrimination based on nationality and place of residence, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other States party to the EEA Agreement.³⁵

The approach of the EFTA Court is confirmed in the EU case-law. Firstly, the freedom to provide services is guaranteed by prohibition for Member States to make the provision of services in its territory subject to compliance with all the conditions required for establishment, since such requirement would deprive of all practical effectiveness the provisions of the Treaty.³⁶ Subsequently, it is established that the requirement of a permanent establishment is the very negation of the freedom to provide services.³⁷

Secondly, the CJEU has unequivocally stated that Article 56 of the TFEU entails, in the first place, the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided.³⁸

³³ EFTA Court. *Judgment of 10 December 1998, Case E-3/98 Herbert Rainford-Towning*, 1998 EFTA Court Report, 205, paragraph 42.

³⁴ EFTA Court. *Judgment of 12 December 2003, Case E-1/03 EFTA Surveillance Authority v Iceland*, 2003 EFTA Court Report, paragraph 28.

³⁵ EFTA Court. *Judgment of 12 December 2003, Case E-1/03 EFTA Surveillance Authority v Iceland*, 2003 EFTA Court Report, paragraph 13.

³⁶ CJEU. *Judgment of the Court of 25 July 1991, Case C-76/90, Säger v Dennemeyer*, ECR 1991 p. I-04221, paragraph 12.

³⁷ CJEU. *Judgment of the Court of 4 December 1986, Case 205/84, Germany v. Commission*, ECR 1986 p. I-3755, paragraph 52.

³⁸ CJEU. *Judgment of the Court of 4 December 1986, Case 205/84, Germany v. Commission*, ECR 1986 p. I-3755, paragraph 52; *Judgment of the Court of 25 July 1991, Case C-288/89, Gouda*, ECR 1991 p. I-4007, paragraph 10.

Thirdly, the CJEU in *Säger v Dennemeyer* has determined that [Article 56 of the TFEU] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.³⁹

1.3.5. Restrictions of the freedom to provide services are not justified

A restriction on the freedom to provide services which is prohibited under Article 36 of the EEA Agreement can in principle be justified on grounds of public interest such as securing access to medical, cultural and commercial. According to the jurisprudence of the EFTA Court, these goals must, however, be pursued in compliance with the principle of proportionality, according to which any measures taken have to be suitable and necessary.⁴⁰

The Defendant has not shown that the restriction of other EEA Agreement Member States persons' freedom to engage in fishing of crab, lease of ships or personnel which could be involved in fishing of crab is a necessary mean to achieve the public interest goals enshrined in the EEA Agreement. As a result, the Disputed secondary Legislation infringes Article 36(1) of the EEA Agreement.

1.3.6. Infringement of the principle of proportionality

According to the EFTA Court jurisprudence, the restrictive measure chosen by an EEA Contracting Party must be proportionate to the aim pursued. It must be established that measures taken are suited to achieve the objective sought, and that the same objective may not be as effectively achieved by measures which are less restrictive of intra-EEA trade.⁴¹

It should be noted that the aims pursued by the Disputed secondary Legislation are incoherent and not clear. However, it is evident that any objective sought by the Disputed secondary Legislation may be achieved through less restrictive measures, since the Disputed secondary Legislation effectively prohibits any person from other EEA Agreement member states from catching crab in Norway's administered maritime zones.

³⁹ CJEU. *Judgment of the Court of 25 July 1991, Case C-76/90, Säger v Dennemeyer*, ECR 1991 p. I-04221, paragraph 12.

⁴⁰ EFTA Court. *Judgment of 12 December 2003, Case E-1/03 EFTA Surveillance Authority v Iceland*, 2003 EFTA Court Report, paragraph 35.

⁴¹ EFTA Court. *Judgment of 25 February 2005, Case E-4/04 Pedicel A/S v Sosial- og helsedirektoratet (Directorate for Health and Social Affairs)*, 2005 EFTA Court Report, 1, paragraph 56; *Judgment of 26 June 2007, Case E-2/06 EFTA Surveillance Authority v. Norway*, EFTA Court Report, 164, Paragraph 82.

1.3.7. Objective justifications are not applicable

The case-law of the CJEU sets that national rules which prohibit access to national waters and which are not intended to achieve an objective of conservation can not be covered by the power of Member States.⁴²

In relation to whether the Disputed secondary Legislation constitutes a suitable and objectively justifiable measure, the Complainants are not aware of any scientific study in support of the prohibition or limitation of catch of crab or justifying a differential treatment within or outside territorial waters.

1.4. Contacts already made with national authorities, whether central, regional or local

On 8 October 2015 the Norwegian Directorate of Fisheries informed⁴³ the Ministry of Agriculture of the Republic of Lithuania on prohibition for foreign vessels to catch crab in the Norwegian Economic Zone, the Fisheries Protection Zone around Svalbard and the territorial waters of Svalbard pursuant to the Provisions for prohibition of snow crab of 2015.

On 3 March 2016 the Lithuanian Fisheries Service noted⁴⁴ that:

“Pursuant to Articles 77(1) and 77(2) of the UNCLOS, it may be construed that if the coastal State does not exercise its sovereign rights for the purpose of exploring it and exploiting its natural resources on the continental shelf, it forfeits its sovereign rights for the purpose of exploring it and exploiting its natural resources on the continental shelf. In such case the right to exploiting natural resources may arise without explicit consent of the coastal State.”

In the 3 March 2016 letter of the Lithuanian Fisheries Service it was maintained that if there is no information about Norwegian exploration or exploitation of resources on the continental. Therefore, the Lithuanian Fisheries Service is not obliged to request the coastal State (i.e. the Norwegian Directorate of Fisheries) to grant permit for fishing of crab.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴² CJEU. *Judgment of the Court of 10 July 1984, 63/83 Regina v Kent Kirk*, ECR 1984, 2689, paragraph 19.

⁴³ 8 October 2015 letter of the Norwegian directorate of fisheries, Exhibit CL13.

[REDACTED]

[REDACTED]

1.4.1. Recourse to national courts or other legal procedures such as arbitration or conciliation

No respective decision or award has been adopted in respect of the Disputed secondary Legislation.

1.5. Evidence or documents supporting the complaint, including any national measures

List of evidence:

Footnote in the Complaint	Legal exhibits cited under the particular footnote	Corresponding Legal Exhibit No
4	The 29 April 2014 Permit to fly Lithuania's State Flag	CL01
4	[REDACTED]	[REDACTED]
4	[REDACTED]	[REDACTED]
5	The 15 July 2016 nota of the Royal Ministry of Foreign Affairs to the Embassy of the Republic of Lithuania	CL04
6	[REDACTED]	[REDACTED]
7	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]
9, 45	[REDACTED]	[REDACTED]
13	The 31 December 2015 letter of the European Commission	CL09
14	The 1 January 2016 letter of the Lithuanian Fisheries Service	CL10
	The Provisions for prohibition of snow crab (<i>chionoecetes opilio</i>) catching adopted on 19 December 2014 by the Ministry of Trade, Industry and Fisheries and entered into force on 1 January 2015. Amended with the provisions No. 137 dated on the 19 of February 2015, the provisions No. 1833 dated on the	CL11

⁴⁹ 9 August 2016 letter of the Ministry of Agriculture of the Republic of Lithuania to the Norwegian Directorate of Fisheries, Exhibit CL18.

	22 of December 2015.	
17	The Act on the Right to Participate in Fishing and Catching adopted on 26 March 1999 by the Department of Primary Industry and Fisheries and entered into force on 1 January 200 and last amended on 19 June 2015.	CL12
43	[REDACTED]	[REDACTED]
44	[REDACTED]	[REDACTED]
46	[REDACTED]	[REDACTED]
47	[REDACTED]	[REDACTED]
48	[REDACTED]	[REDACTED]
49	[REDACTED]	[REDACTED]

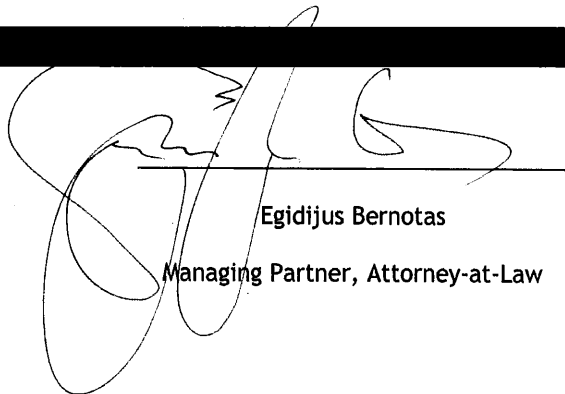
1.6. Confidentiality

We request the EFTA Surveillance Authority not to disclose the identity of the Complainants in its contacts with the authorities of the EFTA State against which the complaint is made.

1.7. Request to the EFTA Surveillance Authority

Due to above considerations, we hereby request the EFTA Surveillance Authority to investigate the nature and effects of the Disputed Legislation and pursue the respective action against the Kingdom of Norway due to the Disputed Legislation being in breach of fundamental EEA Agreement principles of non-discrimination on the basis of nationality, freedom of establishment, the free movement of capital and services.

[REDACTED]



Egidijus Bernotas

Managing Partner, Attorney-at-Law