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Case No: 82637  
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EFTA SURVEILLANCE  
AUTHORITY

Dear Madam/Sir,

**Subject: Complaint against Norway concerning certain requirements related to quality standards for fish**

## **1 Introduction**

On 1 October 2018, you submitted a complaint to the EFTA Surveillance Authority (“the Authority”) against Norway concerning certain requirements in the Norwegian legislation on quality of fish and fish products related to quality standards for fish from aquaculture (Doc No 932397).

In the complaint you allege that the requirements in the Norwegian legislation stating that aquaculture fish products with certain quality defects cannot be sold for human consumption unless they have been subject to corrective measures in Norwegian establishments with necessary equipment, are in breach of EEA law and in particular of Articles 12 and 13 and Protocol 9 of the EEA Agreement.

In a letter dated 3 February 2019 (Doc No 1050056), you further alleged that the Norwegian provisions are not in line with EEA food safety legislation and the freedom to provide services. In a letter dated 28 April 2019 (Doc No 1066864), you provided further information concerning a change in the Norwegian provisions and additional elements in support of the complaint.

## **2 Norwegian law**

Article 17 of the Norwegian Regulation on quality of fish and fish products<sup>1</sup> (“Article 17 of the Norwegian Regulation”) provides that:

- Aquaculture fish is to be sorted so that fish with wounds, malformations, obvious handling defects or internal quality defects are not sold for human consumption;
- Fish with such defects can nevertheless be sold directly to operators domestically that have the necessary equipment for the correction of defects before the product is sold for human consumption, or directly to operators domestically for the production of fish meal, fish protein hydrolyzate, fish oil, cod liver oil and other marine ingredients for human consumption;
- In the case of domestic transport of fish with such defects, the packaging is to be clearly marked "Only for domestic production"<sup>2</sup>.

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<sup>1</sup> Forskrift No 2013-06-28-644 om kvalitet på fisk og fiskevarer.

An amendment to Article 17(1) of the Norwegian Regulation was adopted on 26 April 2019, specifying that farmed fish is to be sorted domestically<sup>3</sup>.

### 3 Assessment

Article 17 of the Norwegian Regulation entails restrictions on exports of aquaculture fish products to other EEA States, by requiring that such fish products must be sorted domestically and fish not complying with certain quality standards must be processed in Norwegian establishments.

In this regard and first of all, Article 8(3) of the EEA Agreement provides that:

*“Unless otherwise specified, the provisions of this Agreement shall apply only to:*

- (a) products falling within Chapters 25 to 97 of the Harmonized Commodity Description and Coding System, excluding the products listed in Protocol 2;*
- (b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.”*

The fish products concerned by Article 17 of the Norwegian Regulation fall within Chapter 3 of the Harmonized Commodity Description and Coding System, and are not specified in Protocol 3 of the EEA Agreement.

It follows that they are not subject to the provisions of the EEA Agreement, unless otherwise specified. In particular, they are not subject to Article 12 of the EEA Agreement concerning restrictions on exports.

The question also arises whether Article 17 of the Norwegian Regulation is subject to relevant provisions of Protocol 9 of the EEA Agreement on trade in fish and other marine products. Protocol 9 sets requirements concerning movement of fish products between the EFTA States and the EU in its Articles 1 and 2, in particular requirements for EFTA States and the EU respectively, concerning the abolition of customs duties and prohibition of quantitative restrictions on imports of certain products. Concerning the EFTA States, it provides in its Article 1 that:

*“1. Without prejudice to the provisions referred to in Appendix 1, the EFTA States shall upon entry into force of the Agreement abolish customs duties on imports and charges having equivalent effect on the products listed in Table I of Appendix 2.*

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<sup>2</sup> Article 17 of the Norwegian Regulation provides that «*Oppdrettet fisk skal sorteres slik at fisk med sår, misdannelser, grove behandlingsfeil eller indre kvalitetsfeil ikke omsettes til humant konsum. Fisk med slike feil som nevnt i første ledd, kan likevel omsettes direkte til virksomheter innenlands som har nødvendig utstyr og hvor feilretting før omsetning til humant konsum skal foretas, eller direkte til virksomheter innenlands for produksjon av fiskemel, fiskeproteinhydrolysat, fiskeolje, tran og andre marine ingredienser til humant konsum. Ved innenlands transport av fisk med feil som nevnt i første ledd, skal emballasjen merkes tydelig «Kun for tilvirkning innenlands».*

<sup>3</sup> Article 17(1) of the Norwegian Regulation, as amended, provides: «*Oppdrettet fisk skal sorteres innenlands slik at fisk med sår, misdannelser, grove behandlingsfeil eller indre kvalitetsfeil ikke omsettes til humant konsum.*»

2. *Without prejudice to the provisions referred to in Appendix 1, the EFTA States shall apply no quantitative restrictions on imports or measures having equivalent effect on the products listed in Table I of Appendix 2. In this context the provisions of Article 13 of the Agreement shall apply.*”

This provision does not cover restrictions on exports of fish products or measures having equivalent effect imposed by the EFTA States. It follows that the measures at issue are not subject to this provision.

Thirdly, fish products are subject to EEA legislation concerning food safety incorporated in Annexes I and II of the EEA Agreement. These acts contain provisions applicable to fish products, however they concern food safety and hygiene requirements, and not quality standards. Article 17 of the Norwegian Regulation concerns quality and marketing aspects which are not regulated in EEA food safety legislation.

Finally, the question arises whether Article 17 of the Norwegian Regulation is subject to the provisions of the EEA Agreement concerning the freedom to provide services.

In this regard, Article 37 of the EEA Agreement provides that: *“Services shall be considered to be 'services' within the meaning of this Agreement where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.”*

It is understood that the operations subject to Article 17 of the Norwegian Regulation consist of sorting and further processing of fish before being sold for human consumption.

In this regard, the Court of Justice of the European Union considered that the process of production of goods cannot be considered as the provision of services in the meaning of the provisions on the freedom to provide services, as it results in the manufacture of a product<sup>4</sup>.

Likewise, the processing operations related to sorting and correction of fish before its sale for human consumption cannot be considered as services in the meaning of the provisions of the EEA Agreement on the freedom to provide services, as they result in the production of a final product.

Considering, in the alternative, that the sorting and processing of fish would consist of services, they would still be excluded from the scope of the provisions on services. Indeed, it follows from the case-law of the EFTA Court that a service which is inseparably linked to the sale of products that fall outside the scope of the EEA Agreement must be deemed to be excluded from the scope of Article 36 of the EEA Agreement on the freedom to provide services, and that any national measure which is inseparably linked to the trade in such products falls in itself outside the scope of the EEA Agreement<sup>5</sup>.

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<sup>4</sup> See Judgment of 11 July 1985 in Joined Cases 60 and 61/84, ECLI:EU:C:1985:329, paragraph 10, which states in relevant parts that: “ [...] it must be emphasized that it is not possible to regard the process of production of video-cassettes as the provision of 'services' within the meaning of the Treaty since the services of a manufacturer of such products result directly in the manufacture of a material object which is, moreover, the subject of classification in the Common Customs Tariff (heading 37.07). According to Article 60 of the Treaty services are only to be considered as such if they are provided for remuneration 'in so far as they are not governed by provisions relating to freedom of movement for goods.'”

<sup>5</sup> Judgments of the EFTA Court of 25 February 2005 in Case E-4/04, *Pedical AS v Sosial- og helsedirektoratet*, [2005] EFTA Ct. Rep. 1, paragraph 34 and of 15 December 2016 in Case E-1/16, *Synnøve Finden v Staten v/ Landbruks- og matdepartementet*, [2016] EFTA Ct. Rep. 931, paragraph 59.

In this regard, it appears that sorting and processing operations are inseparably linked to the sale of fish, as they are processing steps for the purpose of the sale of fish. Measures imposing restrictions on these operations, such as the one at issue, therefore fall outside the scope of Article 36 of the EEA Agreement.

In light of the above, the Authority's Internal Market Affairs Directorate intends to propose that the Authority close the case. The Authority may, however, revert to the matter should any relevant developments occur in EEA or EU law.

Before the Internal Market Affairs Directorate makes such a proposal, you are invited to submit your observations on the above assessment and to present any new information by *23 August 2019*.

Yours sincerely,

Gunnar Thor Petursson  
Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Gunnar Thor Petursson.*