Brussels, 2 April 2004
Case No: 2229
Event No: 256967
Dec. No: 66/04/COL

EFTA SURVEILLANCE AUTHORITY

REASONED OPINION
delivered in accordance with Article 31 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice regarding Norway's breach of Article 28 of the EEA Agreement and of Articles 1 and 4 of the Act referred to at point 2 of Annex V to the EEA Agreement (*Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community)*, as amended

I Introduction

On 7 January 2002, the Authority registered a complaint against Norway concerning an alleged infringement of the principle of free movement of workers in Article 28 of the EEA Agreement, as substantiated by Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, adopted to the EEA Agreement by Annex V and Protocol 1 thereto (hereinafter Regulation 1612/68). The complainant company, which owns a fishing vessel registered in Norway, sailing under Norwegian flag, had in the Court of Appeal been held responsible under Norwegian law for e.g. allowing the mentioned vessel to engage in fishing within the Norwegian Exclusive Economic Zone (EEZ) with a Dutch captain and a Dutch crew.

II National legislation

The judgment against the complainant was based on Section 3(2) of Act No 19 of 17 June 1966 relating to Norway's fishing boundaries and prohibition of fishing etc. by foreign nationals within the Norwegian fishing boundaries (*Lov 1966-06-17 nr 19* om *Norges fiskerigrense og om forbud mot at utlendinger driver fiske m.v. innenfor fiskerigrensen*), hereinafter the Fisheries Act. Section 3(2) the Fisheries Act requires that at least 50% of the crew members or sharesmen on vessels fishing inside the Norwegian fisheries limits be Norwegian or resident in Norway.

III Relevant EEA law

Article 28 of the EEA Agreement lays down the fundamental principle of free movement of workers within the EEA. According to Article 28(2), this freedom shall entail the abolition of any discrimination based on nationality between workers of EC Member States and EFTA States as regards employment, remuneration and other conditions of work and employment. This provision corresponds to Article 39 of the EC Treaty.

The right to free movement is substantiated by the Act referred to at point 2 of Annex V to the EEA Agreement (*Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community),* as amended and as adapted by way of Protocol 1 to the EEA Agreement and as adapted by the specific adaptation in Annex V EEA (hereinafter referred to as Regulation 1612/68 or the Regulation).

Article 1(1) of Regulation 1612/68 states that "*any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.*" Article 1(2) of Regulation 1612/68 states that "*he shall, in particular, have the right to take up available employment with the same priority as nationals of that State.*"

Article 3(1) of Regulation provides, *inter alia*, that "*under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:*
- where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of own nationals (...)."

According to Article 4(1) of Regulation 1612/68, "*provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member States*".

IV The development of the case and the letter of formal notice

On 13 March 2002 (doc. no 02-1858-D), the Authority sent a letter to the Government of Norway requesting all relevant information, including documentation and explanations concerning the rationale behind Section 3(2) of the Fisheries Act and its compatibility with Article 28 of the EEA Agreement and with Article 4(1) of Regulation 1612/68. In the Norwegian reply of 22 May 2002, it is argued that the EEA Agreement does not apply in the Norwegian EEZ outside the Norwegian territorial waters. Reference is in particular made to the arguments put forward in the Norwegian reply of 10 May 2000 to the Authority's Reasoned Opinion of 24 September 1999 concerning the application of Council Regulation 1408/71 in the EEZ (doc. no 99-6990-D).

After having assessed the Norwegian reply, the Authority on 16 August 2002 (doc. no 02-5970-D) sent a second letter to Norway, emphasising that the free movement of workers is one of the fundamental principles of the European Economic Area and that Section 3(2) of the Norwegian Fisheries Act clearly restricts the possibilities for other EEA nationals to exercise their freedom to work onboard Norwegian fishing vessels. Moreover, the Authority recalled that the scope of application of the EEA Agreement is to be defined in a functional manner, and in light of the object and purpose of the EEA Agreement. The Norwegian authorities were invited to submit comments on these observations.

By its letter of 9 December 2002 (your ref. 2001/889), the Norwegian authorities replied to this letter, mainly arguing that (i) fishing vessels operating in the Norwegian EEZ fall outside the scope of application of the EEA Agreement as long as no specific arrangements between the Contracting Parties exist regarding manning of fishing vessels and (ii) the main part of the EEA Agreement does not apply to fish. Consequently, Section 3(2) of the Fisheries Act is considered to fall outside the scope of the EEA Agreement. Reference was further made to Article 20 of the EEA Agreement and Protocol 9 to the EEA Agreement concerning trade in fish and other marine products. Furthermore, the Norwegian authorities referred to the exemptions provided in Annex VIII, point 10 of the EEA Agreement concerning right of establishment and Annex XII, point 1h of the EEA Agreement on free movement of capital. In addition, it was pointed out that Norway does not take part in the forming of the European Union's Common Fisheries Policy. Furthermore, it was added by Norway that the objectives of the regulation in the Fisheries Act are to maintain settlements and employments in coastal districts and to ensure that the harvesting of marine resources continues to benefit the coastal population.

On 16 July 2003, the Authority issued a letter of formal notice to Norway (Doc. No. 03-116-D) where it concluded that by maintaining in force Section 3(2) of the Fisheries Act, hereby upholding nationality and residence requirements for crew members and sharesmen on Norwegian fishing vessels, Norway is in breach of Article 28 of the EEA Agreement and of Articles 1 and 4 of the Act referred to at point 2 of Annex V to the EEA Agreement (Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community), as amended and adapted by Protocol 1 to the EEA Agreement and by way of specific adaptations contained in Annex V to the EEA Agreement.

V Norway's reply to the letter of formal notice

By its letter of 8 December 2003 (your ref. 2001/889) the Norwegian Government submitted its observations on the content of the letter of formal notice. The Norwegian Government argued that "*the letter of formal notice deals with an element of national fishery policy which lies in Norway's exclusive fishery policy and competence*". Furthermore, the Norwegian Government stated that the Norwegian legislation requiring Norwegian nationality or residence in Norway for at least 50 per cent of crew members on board fishing vessels flying Norwegian flag constitutes an integral part of the national fishery policy.

The Norwegian Government also stated that when assessing the scope of application of the EEA Agreement in the case in hand, the intentions and purpose of the Agreement must be taken into account. Furthermore, according to the Norwegian Government, the present case must be assessed in relation to the special arrangement pertaining to fisheries within the EEA Agreement (Article 20, Protocol 9, Protocol 13, Protocol 46, Annex VIII, Annex XII, several declarations etc). As its general observation the Norwegian Government noted that fisheries constitute an economic sector that is only to a limited degree regulated by the general rules of the EEA Agreement.

Furthermore, the Norwegian Government referred to the general objectives of the EU's common fisheries policy which it considers similar to the objectives of the Norwegian fisheries policy. According to the Norwegian Government "*the EU fishery policy also includes regional elements and considerations, and a clear policy aim is to preserve and strengthen the coastal regions of the Union.*" It is stated that Norway "*uses legislation in order to ensure that there are local links between the industry and the local communities that are dependent on fisheries.*"

According to the Norwegian Government, if the assessment by the Authority as set out in the letter of formal notice were to be accepted, Norway would be prevented from using measures in its fishery policy that are allowed within the EU. In particular, Norway would be prevented from adopting a policy of requiring an economic link between coastal communities and fishing vessels.

The Norwegian Government concluded that it does not concur with the conclusion expressed by the Authority in the letter of formal notice of 16 December 2003.[1]

VI The Authority's Assessment

VI.1. The scope of application of the EEA Agreement

In the discussions between the Norwegian Government and the Authority two points have been raised in relation to the scope of the EEA Agreement. First, Norway originally – and most prominently in the above mentioned letter of 22 May 2002 - argued that the EEA Agreement does not apply in the Norwegian EEZ and that the contested act therefore should fall outside the geographical scope of the Agreement. Second, Norway has, on several occasions, argued that the contested act falls outside the substantive scope of the EEA Agreement as it should be seen as a part of Norway's exclusive fishery policy. In contrast, the Authority has found that the Fisheries Act falls within both the material and the geographical scope of the EEA Agreement and has argued extensively to that effect in its letter of formal notice.

As the Norwegian Government has not, in its otherwise detailed response of 8 December 2003 to the Authority's letter of formal notice, disputed the Authority's assessment that the contested act does indeed fall within the geographical scope of the Agreement, the Authority assumes that the Norwegian Government now concurs with the Authority's assessment on that point. In this reasoned opinion, with regard to the geographical scope of the EEA Agreement, the Authority shall therefore confine itself to referring to the assessment previously set out in its letter of formal notice. The Authority shall instead address in more detail the Norwegian Government's argument that the Fisheries Act falls outside the material scope of the Agreement.

It is common ground that fishery policy is outside the scope of the EEA Agreement. This is explicitly stated in the Joint Declaration on the agreed interpretation of Articles 4(1) and (2) of Protocol 9 on trade and fish and other marine products. Nevertheless, it is the view of the Authority that such policy has to be exercised in conformity with the obligations arising from the EEA Agreement.

In its letter of 8 December of 2003 the Norwegian Government has argued that the scope and purpose of the EEA Agreement and EC Treaty are very different as regards fisheries sector, and this has implications for the interpretation of EEA and EU rules on fisheries. According to the Norwegian Government, "*the regulatory regime for fisheries under the EEA Agreement (Protocol 9 etc.) is more similar to a traditional free-trade agreement than to the rest of the EEA Agreement*".

From the content of the provisions in Protocol 9 and also the context in which reference to these provisions is set in the main body of the EEA Agreement (i.e. Part II, Free movement of goods, Chapter 2, Agricultural and fishery products), it emerges that

[1] Further arguments presented by the Norwegian Government will be introduced below under the different subheadings they relate to.

Protocol 9 in principle forms an independent, basic set of rules governing *trade* in fish and other marine products, separate from (except when otherwise provided) other provisions in Part II in the main body of the EEA Agreement. In addition, the Protocol contains specific rules regarding competition, state aid and certain rules on access to ports. In other words Protocol 9 is a *lex specialis* for *trade* in the EEA in fish and other marine products and it essentially concerns abolition or reduction of customs duties on certain fish and other marine products.[2]

In the opinion of the Authority, the existence of specific rules governing EEA *trade* in fish and other marine products does not imply that other provisions of the Agreement - not concerning trade in fish - do not apply to a situation involving fishing vessels or fisheries, such as the one at stake in the present case, which concerns EEA nationals' access to employment onboard Norwegian fishing vessels. This is apparent when considering that certain exemptions for Norway are provided in relation to fisheries both in Annex VIII with regard to establishment and in Annex XII with regard to free movement of capital, but not in Annex V concerning free movement of workers.

The Norwegian Government has referred to the special provisions in Annex VIII on the right of establishment, point 10 and Annex XII on the free movement of capital, point 1h. It follows from these provisions that, with regard to the right of establishment, Norway may continue to apply restrictions existing on the date of signature of the EEA Agreement on establishment of non-nationals in fishing operations or companies owning or operating fishing vessels. As to the free movement of capital, Norway may continue to apply restrictions existing on the date of signature of the EEA Agreement, on ownership by non-nationals of fishing vessels. However, Norway does not have any similar provisions deviating from the provisions of Annex V of the EEA Agreement concerning the free movement of workers. Nor does the Agreement contain any other relevant adaptations of the kind that are found with regard to capital and establishment. Thus, the Authority must conclude that Protocol 9 on trade in fish and other marine products and the aforementioned adaptations in Annex VIII and Annex XII to the EEA Agreement are not relevant in relation to the free movement of workers and may, consequently, not be relied upon by Norway in relation to Section 3(2) of the Fisheries Act.

In its letter of 8 December 2003 the Norwegian Government states that input regulations in the form of licensing schemes that regulate access to the fishery sector "*relate both to the vessels that are entitled to take part in the different fisheries, and to the people who are entitled to take part or to own fishing vessels. To be registered as a fisherman, a person must fulfil a number of criteria. The nationality and residential requirement is one of these. The criteria were established to achieve the political objective of national ownership of fishing vessels and to ensure that only active fishermen with links to Norway were entitled to take part in harvesting Norwegian fisheries resources.*"

It should be noted that the Authority does not dispute the Norway's right to design and manage its fishery policy, including the adoption of licensing schemes that regulate access to fishery sector. The Authority is challenging Section 3(2) of the Fisheries Act in so far as it restricts non-Norwegian EEA nationals' access to employment on board Norwegian fishing vessels. Therefore, the current case concerns only the free movement of workers as laid out in Article 28 of the EEA Agreement. In light of this, it is the view of the Authority that the argument of the Norwegian Government that the issue at stake constitutes an element of national fishery policy, as well as the arguments concerning the objectives of the Norwegian fishery policy, the need for coherent management of the fisheries sector

[2] To that effect see the Judgment of the EFTA Court in Case E-2/03 *Ákæruvaldð (The public Prosecutor) v Ásgeir Logi Ásgeirsson, Axel Pétur Ásgeirsson and Helgi Már Reynisson* EFTA Court Report [2003], p. 185, para. 36.

and access to fishery sector in the sense of ownership of fishing vessels are of no relevance in the current case.

In any case, it is settled case law that even in the fields which as such fall outside the scope of application of the EEA Agreement, EFTA states must exercise their powers consistently with EEA law.[3] It is the view of the Authority that in the context of the present case this principle entails that the exercising of Norway's powers in the fishery sector must not result in infringement of the EEA rules in this case regarding the freedom of movement for workers within the EEA.

Finally, in its letter of 8 December 2003 the Norwegian Government states that the Authority's conclusion as laid out in the letter of formal notice would also disturb the overall balance of the various bilateral agreements between Norway and the EU in the area outside the Authority's competence. The Norwegian Government has not specified further the substance of this argument. It is, however, the view of the Authority that the possible existence of bilateral agreements between an EFTA State and the EU in the areas that do not fall within the scope of the EEA Agreement would not detract from the obligations arising from Article 28 of the EEA Agreement and Regulation 1612/68.

VI.2. The free movement of workers

Free movement of workers is one of the fundamental freedoms in the European Economic Area. It is settled case law of the Court that the Member States have to remove all obstacles to the freedom of movement of workers.[4] This is further substantiated by Article 1(1) and Article 4(2) of Regulation 1612/68.

a) The concept of a "worker"

The Authority recalls that, in the letter of 9 December 2002, the Norwegian Government informed the Authority that almost every fisherman in Norway is a self-employed person. In this respect it must be noted that the definition of a worker is an EEA law concept and is not subject to the discretion of the individual States.[5] The concept must be defined in accordance with objective criteria, which distinguish the employment relationship, by reference to rights and duties of the persons concerned. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives remuneration.[6] As far as fishermen are concerned, it shall be emphasised that the sole fact that a person is paid a "share" and that his remuneration may be calculated on a collective basis is not of such a nature as to deprive that person of his status as a worker[7] and thus, his right to free movement under the provisions concerning free movement of workers. The Norwegian Government has not provided information that would prove that fishermen who are considered as self-employed by Norway should not be considered as being workers in the sense of EEA law. As long as the Norwegian Government does not

[3] With regard to taxation systems which, as a general rule, are not covered by the EEA Agreement, see Judgment of the EFTA Court in Case E-1/03 *EFTA Surveillance Authority and the Republic of Iceland* EFTA Court Report [2003] p. 143, where the EFTA Court, in paragraph 26, states with regard to taxation that *"(...) as a general rule, the tax system of an EEA/EFTA State is not covered by the EEA Agreement. The EEA/EFTA States must, however, exercise their taxation power consistently with EEA law."*

[4] See in particular, Case 118/75 *Watson and Belmann* [1976] ECR 1185, para. 16, and Case C-370/90 *The Queen v Immigration Appeal Tribunal and Surinder Singh* [1992] ECR I-4265, para. 15.

[5] This principle was established already in Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177.

[6] Case 66/85 *Lawrie-Blum* [1986] ECR 2121, para. 17.

[7] See e.g. Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Foods, ex parte Agegate Ltd.*, [1989] ECR 4459, para. 36.

demonstrate otherwise, the Authority considers that fishermen on board fishing vessels fall within the definition of worker as laid down by the case law of the Court. Moreover, even if some of the sharesmen or crew members – few or many – should be considered as self-employed, this does not, in any event, imply that other sharesmen or crewmembers should not be considered as workers in the sense of Article 28 of the EEA Agreement.

b) Prohibition of discrimination on the basis of nationality

A requirement, according to which crewmembers or sharesmen must be of Norwegian nationality or be resident in Norway in order to be employed on board Norwegian fishing vessels, is directly discriminatory, since it implies that a Norwegian national, contrasting to nationals of other EEA States, may be employed on board such vessels regardless of whether he or she is resident in Norway. Such a requirement makes employment on board of Norwegian fishing vessels conditional upon a residence condition which only nationals of other EEA States have to meet. Therefore, the Authority submits that the requirement in Section 3(2) of the Fisheries Act is directly discriminatory and thus incompatible with Article 28 EEA and with Articles 1 and 4 of Regulation 1612/68.[8]

Apart from the public service derogation contained in Article 28(4) of the EEA Agreement, the prohibition against direct discrimination with regard to access to employment is absolute and not subject to the derogations permitted in Article 28(3).[9] Exceptions to free movement based on public policy, public security or public health are only permitted in cases, which fall under paragraphs (a) to (d) of Article 28(3).[10] As further provided by Article 4 of Regulation 1612/68, as incorporated into the EEA Agreement, a provision restricting by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of other EEA states.

c) The justification grounds put forward by the Norwegian Government

In its letter of 8 December 2003 the Norwegian Government argues that *"the main objectives of Norwegian fisheries policy are efficient use of resources in economic terms, which means seeking the highest possible rate of return from the fisheries sector, and to maximise the social benefits for Norwegian coastal communities."* Furthermore, in its letter of 9 December 2002 the Norwegian authorities argue that the objectives of the regulation in the Fisheries Act are *"briefly to maintain settlements and employment in coastal districts and to ensure that harvesting of marine resources continue to benefit coastal population."* However, in view of the Authority, such aims, as laudable as they may be, are not aims that could justify **direct** discrimination based on nationality. Moreover, even if that were to be the case, Norway would nevertheless have to show that

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[8] See Case 167/73, *Commission v France* [1974] ECR 359, in which the Court of Justice declared French legislation, containing a mandatory requirement of French nationality for the crew on e.g. fishing vessels, incompatible with Article 48 of the EC Treaty (now Article 39 EC).

[9] As for Article 39(3) of the EC Treaty see e.g. Case 15/69 *Württembergische Milchverwertung-Südmilch AG v Salvatore Ugliola* [1969] ECR 363.

[10] In Case C-47/02 *Albert Anker, Klaas Ras, Albertus Snoek and Bundesrepublik Deutschland* the Court of Justice recalled that the right of Member States to restrict the free movement of persons on grounds of public policy, public security or public health is not intended to exclude economic sectors such as fishing or occupations, such as master of fishing vessels, from the application of that principle as regards access to employment, but to allow Member States to refuse access to their territory or residence there to persons whose access or residence would in itself constitute a danger for public policy, public security or public health. Judgment of the Court of 30 September 2003, para. 68.

the contested act satisfies the principle of proportionality, i.e., that the direct discrimination is both suitable and necessary to achieve the said objectives.[11]

The Norwegian Government has not presented any arguments to this effect. Suffice it to repeat here that the residence requirement in Section 3(2) of the Fisheries Act is not applicable to Norwegian nationals, that is, Norwegian nationals are able to become crewmembers or sharesmen onboard of Norwegian fishing vessels regardless of where in the world they reside. Furthermore, the residence requirement, which only applies to other EEA nationals, can be fulfilled by every EEA national residing in Norway and not just by those residing in the coastal areas dependent on fisheries. The Authority fails to see how such a residence requirement could be considered necessary, suitable and appropriate to attaining objectives referred to by the Norwegian Government.[12]

In its letter of 8 December 2003 the Norwegian Government, moreover, refers to the UK system of the licensing of fishing vessels and maintaining economic links with the fishing communities of the United Kingdom. According to the Norwegian Government "*if the assessment by the Authority as set out in the letter of formal notice were to be accepted (...) Norway would be prevented from adopting a policy of requiring an economic link between coastal communities*" and that "*it must be presumed that Norway under its exclusive fishery policy cannot be excluded from implementing at least measures that almost correspond to those accepted within the EU by the Commission*".

It is the understanding of the Authority that by this the Norwegian Government is referring to one of the four *options* (option B) by which a vessel owner may demonstrate that his vessels maintains an economic link with the populations of the United Kingdom dependent on fisheries and related industries, that is, by employing a crew of whom at least 50% are normally resident in the United Kingdom **coastal area** (emphasis added).[13] It should be noted that the option B (employing a crew of whom at least 50% are normally resident in the UK coastal area) is only one of the four possible means of demonstrating the existence of such an economic link. Under the UK scheme the owner of a fishing boat is free to choose which of the four options he uses in order to show the existence of an economic link with the UK. The most commonly used method for demonstrating the existence of such link seems to be option A (i.e. landing at least 50% by weight of the vessel's catch of quota stocks into the UK). In addition, according to the material provided by the Norwegian Government, the UK fisheries departments are prepared to consider other means of demonstrating an economic link and the four options are thus neither exclusive nor exhaustive. In conclusion, UK law does not contain any legal requirement that 50 % of the crew is resident in the UK, nor does the UK rules discriminate on the basis of nationality as option B would not be fulfilled by a UK citizen living in another EEA country.[14]

On the basis of the information provided by Norway it appears that the UK system based on the economic link licensing condition provides that British registered fishing vessels over 10 meter in overall length and landing 2 tonnes or more of quota stocks have to demonstrate an economic link with fishing communities in the UK. The economic link

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[11] On proportionality principle, see e.g. Case C-111/91 *Commission of the European Communities v Luxembourg* [1993] ECRI-817 para. 12, Case C-415/93 *Bosman* [1995] ECR I-4921, para. 104, Case C-19/92 *Dieter Kraus v Land Baden Württenberg* [1993] ECR I-1663, para. 32.

[12] See Cases C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Foods, ex parte Agegate Ltd.* above fn 7, para 26 and C-279/89 *Commission of the European Communities v United Kingdom* [1992] ECR I-5785, para 42.

[13] "Fisheries –The Operation of the Economic Link Licence Condition in 2000" enclosed to the Norway's letter of 8 December 2003, p. 2-3.

[14] See the document "The Licensing of Fishing Vessels and Maintaining Economic Links with the Fishing Communities of the United Kingdom" enclosed to the Norway's letter of 8 December 2003.

licence condition was introduced to ensure that British coastal communities dependent on fisheries and related industries derived economic benefit from vessels fishing against UK quotas.[15]

The United Kingdom licensing system, which is linked to the EU Common Fisheries Policy, concerns the criteria for the distribution to vessels flying the flag of the United Kingdom of fishing opportunities available to them. In contrast, the current case concerns EEA nationals' access to employment onboard Norwegian fishing vessels under Article 28 of the EEA Agreement and thus not the criteria for distribution to vessels flying the Norwegian flag of fishing opportunities (e.g. quotas) available to them under Norway's exclusive fishery policy.

As argued by Norway, the fishery policy falls outside the scope of the EEA Agreement. Therefore, the Authority considers that the content of the United Kingdom economic link[16] licensing condition scheme and whether or not it corresponds to the Norwegian measure in question is of limited relevance for the assessment of the current case. Moreover, as a matter of principle, an EFTA state cannot justify a discriminatory measure by referring to existence of certain types of rules in one of the EU Member States.[17] That being said, the Authority wishes to point out the fundamental differences between the option B of United Kingdom scheme and the disputed Norwegian measure.

Section 3(2) of the Norwegian Fisheries Act lays down an absolute requirement that at least 50% of the crew members or sharesmen on vessels fishing inside Norwegian fisheries limits be Norwegian or resident in Norway. The residence requirement in Section 3(2) of the Norwegian Fisheries Act only applies to EEA nationals other than Norwegians[18], and is therefore directly discriminatory. Furthermore, the residence requirement in Section 3(2) can be fulfilled by every EEA national residing anywhere in Norway and not just by those residing in the coastal areas dependent on fisheries, while under the United Kingdom system, if a owner of the vessel chooses Option B in order to show the existence of an economic link, at least 50% of the crew employed shall be normally resident in the United Kingdom coastal area. Furthermore, this residence requirement applies irrespective of the nationality of the crew member.[19]

Therefore, the argument of the Norwegian Government that the Norwegian rules and the UK measures "almost correspond" is not valid. It should also be noted that according to the information submitted to the Authority by the Norwegian Government, in addition to the economic link condition the UK licensing system includes, *inter alia*, a crewing

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[15] See the documents quoted in fn 13 and 14.

[16] The Court of Justice has held in relation to fishing quotas that Member States may require a "real economic link" only in so far as that link concerns only the relations between the fishing vessels' fishing operations and the population dependent on fisheries and related industries. The aim of quotas may justify conditions that are designated to ensure that a real economic link between the vessels and the vessel's flag state if the purpose of such conditions is that the populations dependent on fisheries and other related industries should benefit from the quotas. On the other hand, any requirement of an economic link which exceeds those limits cannot be justified by the system of national quotas. Case 216/87 *The Queen v Ministry of Agriculture, Fisheries and Foods, ex parte Jaderow Ltd.* [1989] ECR 4509, paras. 26 and 43.

[17] Cf. Case E-1/03, *EFTA Surveillance Authority v. The Republic of Iceland, EFTA Court Report* [2003] p. 143, para. 33.

[18] See Article 3(1) of Regulation 1612/68 which provides that national provisions which limit the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals, shall not apply.

[19] The vessel owner must show that at least 50% percent of the total crew man-days at sea in the relevant year are accounted for by crew normally resident in UK coastal areas. See "The Licensing of Fishing Vessels and Maintaining Economic Links with the Fishing Communities of the United Kingdom", p. 3.

condition[20] which stipulates that at least 75% of the crew on board vessel at any time shall be British citizens, nationals of other Member States of the European Community or European Economic Area, or a combination of these.[21] In fact, the Norwegian Section 3(2) of the Fisheries Act appears to amount to such a crewing condition – the main difference being that unlike the UK crewing condition, the Norwegian provision discriminates between EEA workers on the basis of their nationality.

In summary, Section 3(2) of the Fisheries Act which requires that at least 50% of the crew members or sharesmen on vessels fishing inside Norwegian fisheries limits be Norwegian or resident in Norway is directly discriminatory, since it implies that a Norwegian national, contrasting to nationals of other EEA States, may be employed on board Norwegian vessels regardless of whether he or she is resident in Norway. In conclusion, the Authority maintains its view that the provision concerned is not in compliance with the provisions of EEA law concerning free movement of workers

VII. Conclusion

FOR ABOVE REASONS

THE EFTA SURVEILLANCE AUTHORITY,

Pursuant to the first paragraph of Article 31 of the Surveillance and Court Agreement and after having given the Norwegian Government the opportunity of submitting its observations,

DECLARES AS ITS REASONED OPINION THAT

Norway, by maintaining in force Section 3(2) of the Fisheries Act, hereby upholding nationality and residence requirements for crew members and sharesmen on Norwegian fishing vessels, Norway is in breach of Article 28 of the EEA Agreement and of Articles 1 and 4 of the Act referred to at point 2 of Annex V to the EEA Agreement (*Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community),* as amended and as adapted by Protocol 1 to the EEA Agreement and by way of the specific adaptations contained in Annex V to the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Surveillance and the Court Agreement, the EFTA Surveillance Authority requests the Norwegian Government to take the necessary measures to comply with this Reasoned Opinion within two months following notification thereof.

Done at Brussels , 2 April 2004

For the EFTA Surveillance Authority

Bernd Hammermann
College Member

Niels Fenger
Director

[20] The Court of Justice has held that Community law does not preclude a Member State from requiring, as a condition for authorising one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must be nationals of the Member States of the Community. Case C-3/87 *The Queen v Ministry of Agriculture, Fisheries and Foods, ex parte Agegate Ltd.*, [1989] ECR 4459, para. 21.

[21] See "The Licensing of Fishing Vessels and Maintaining Economic Links with the Fishing Communities of the United Kingdom", fn 14, p. 8.