

Case No: 79718  
Document No: 868093  
Decision No: 173/17/COL

EFTA SURVEILLANCE  
AUTHORITY

## EFTA SURVEILLANCE AUTHORITY DECISION

of 4 October 2017

closing a complaint case against the Norwegian Government concerning restrictions  
on commercial fishing or catching of snow crab

### THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

#### **1 Introduction**

On 30 September 2016, the EFTA Surveillance Authority (“the Authority”) received a complaint against Norway.

The complainant maintains, *inter alia*, that nationals from other EEA States are prevented from establishing a company in Norway which could engage in commercial fishing or catching of crab.

On 5 December 2016, the Norwegian Government was invited to comment on the substance of the complaint.<sup>1</sup> By letter dated 13 January 2017, Norway replied to the Authority’s request for information.<sup>2</sup>

The complainant submitted observations on Norway’s response letter in a letter of 27 March 2017.<sup>3</sup>

By letter of 22 May 2017, the Authority’s Internal Market Affairs Directorate (“the Directorate”) informed the complainant of its intention to propose that the Authority should close the case.<sup>4</sup> The complainant was invited to submit any observations on the Directorate’s assessment of the complaint or present any new information by 23 June 2017.

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<sup>1</sup> Document No. 824544.

<sup>2</sup> Document No. 835301.

<sup>3</sup> Document No. 849907.

<sup>4</sup> Document No 848618.

By letter of 23 June 2017, the complainant replied to this letter.<sup>5</sup>

## 2 Relevant national law<sup>6</sup>

### Regulation on prohibition of snow crab catching<sup>7</sup>

*“Section 1 – General prohibition*

*Norwegian and foreign vessels are prohibited from catching snow crab in Norwegian territorial waters and internal waters and on the Norwegian continental shelf. For Norwegian vessels the prohibition also applies on other countries’ continental shelves.”*

*“Section 2 - Dispensation*

*Dispensation from the prohibition of snow crab catching can be given to vessels granted permits in accordance with the Participation Act for capture outside the territorial waters. If the permit is restricted to capture of specific species, dispensation can only be given if the permit includes snow crab catching. [...]*”

### The Act on the Right to Participate in Fishing and Catching (the Participation Act)<sup>8</sup>

*“Section 2 – Scope*

*The Act regulates access to commercial fishing and catching and other harvesting of wild marine resources by vessels which are Norwegian according to the rules of the Maritime Act sections 1 to 4 and vessels owned by a foreigner residing in Norway when the vessel's largest length is less than 15 meters. Vessels which are Norwegian pursuant to Section 1 third paragraph of the Maritime Act are not covered by the Act here unless the vessel is owned by a person residing in Norway and the vessel's largest length is less than 15 meters. The Act here considers vessels covered by the first and second sentences as a Norwegian vessel.*

*The Act does not apply to the harvest of anadromic salmonids as defined in Act of 15 May 1992 No. 47 on salmonids and inland fish etc. Section 5, letter a. The Ministry may by regulation stipulate that all or part of the Act here shall not apply to the harvest of one or more species that are not fish, crustaceans, molluscs or marine mammals.”*

*“Section 3 – Commercial fishing and catching – definition*

*By commercial fishing and catching, this Act means all harvesting of wild marine resources when the professional in question has this as a means of living, alone or in conjunction with other industries, and where a vessel is utilized.*

*[...]”*

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<sup>5</sup> Document No 863890.

<sup>6</sup> The Authority’s unofficial translation.

<sup>7</sup> FOR-2014-12-19-1836, as amended 4 January 2017.

<sup>8</sup> LOV-1999-03-26-15.

*“Section 4 – Permit requirements*

*A vessel cannot be used for commercial fishing or catching unless a permit is granted by the Ministry. Conditions may be imposed for such permits.*

*A permit is issued to the owner of the vessel, for one specific vessel. A permit does not give the right to make use of another vessel. Other persons than the natural or legal person granted the permit, cannot, without an own permit, fish or catch using the vessel.*

*A permit solely gives the right to exercise fishing or catching in accordance with the provisions currently applicable pursuant to or based on the Act on Administration of Wild Marine Resources or the present Act.”*

*“Section 5 – Nationality requirements*

*A permit may only be issued to a Norwegian citizen or a person equal to a Norwegian citizen. A foreigner residing in Norway is considered a person equal to a Norwegian citizen. A foreigner residing in Norway can only be granted a permit when the longest length of the vessel is less than 15 meters.*

*The following companies and associations shall be considered to be equal to a Norwegian citizen:*

- a. Joint-stock companies, public limited companies 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, hereunder the chairman, are Norwegian citizens residing in Norway and residing here for the past two years, and when Norwegian citizens own stocks or shares corresponding to minimum 6/10 of the capital of the company and may exercise voting rights equivalent to minimum 6/10 of the votes.*
- b. Shipping partnerships or other Norwegian companies when the members have unlimited liability for the company's obligations and when Norwegian citizens co-own the company by minimum 6/10.*
- c. Limited partnerships when Norwegian citizens own minimum 6/10 of the liable capital, and when Norwegian citizens own minimum 6/10 of the limited capital contributions.*

*When applying this section ownerships of the Norwegian Government, of institutions or funds managed by the Norwegian Government and of Norwegian municipalities are to be considered equal to Norwegian citizens' ownerships.”*

*“Section 5a – Residence requirements*

*It is prohibited to use a vessel for commercial fishing or catching unless half of the crew and the share fishermen, as well as the captain, reside in a coastal municipality or in municipality neighbouring a coastal municipality. The requirement regarding the captain's residence does not apply if the captain is the owner of the vessel. A dispensation from the residence requirement may, after application, be given for a captain residing elsewhere in Norway, or in the Nordic countries or elsewhere in the EEA area.*

*[...]”*

*“Section 6 – Requirements regarding previous fishing or catching activities*

*Permits may only be granted to those who have engaged in commercial fishing or catching on or with a Norwegian vessel during at least three of the last five years and still is associated with the profession of fishing and catching.*

*Companies or associations may only obtain permits if persons fulfilling the criteria in the first paragraph hold more than 50% of the owner interests and actually has the corresponding control over the company or association.*

*[...]*”

### **3 Relevant EEA Law**

Article 31 EEA on the right of establishment provides that:

*“1. Within the framework of the 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.*

*2. This right shall include the right 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.”*

Article 34 EEA extends the right of establishment to companies and provides that:

*“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.”*

There are special provisions in Annexes 8 and 12 EEA (sectoral adaptations) that concern the freedom of establishment and the free movement of capital in the fishing industry in Norway.

Annex VIII point 10 states that *“Notwithstanding Articles 31 to 35 of the Agreement and the provisions of this Annex, Norway may continue to apply restrictions existing on the date of signature of the Agreement on establishment of non-nationals in fishing operations or companies owning or operating fishing vessels”*.

Annex XII point 1 (h) states that *“notwithstanding Article 40 of the Agreement and the provisions of this Annex, Norway may continue to apply restrictions existing on the date of signature of the Agreement, on ownership by non-nationals of fishing vessels. These restrictions shall not prevent investments by non-nationals in land-based fish processing or in companies which are only indirectly engaged in fishing operations. National authorities shall have the right to oblige companies which have been wholly or partly acquired by non-nationals to divest themselves of any investments in fishing vessels”*.

#### 4 The Authority's assessment

The complainant holds, *inter alia*, that nationals from other EEA States are prevented from establishing a company in Norway which could engage in commercial fishing of crab. It is stated that the legislation confers an unjustified privileged access to vessels owned by Norwegian citizens to fishing of snow crab in the maritime zones of Norway, in particular Svalbard Fisheries Protection Zone and Norwegian continental shelf.

The applicable legislation is the *Regulation on prohibition of snow crab catching* and the *Participation Act of 26 March 1999*. The Act regulates who can fish for a living and states that a vessel cannot be used for commercial fishing unless a commercial license has been issued. Only Norwegian citizens and active fishermen can be issued a commercial license.

The Authority recalls that establishing a company in Norway or the registration of a vessel constitutes in itself an act of establishment within the meaning of Article 31 EEA and therefore the rules on freedom of establishment are applicable.<sup>9</sup>

In its letter of 27 March 2017, the Norwegian Government maintains *inter alia* that restrictions on the freedom of establishment under Article 31 of the EEA Agreement and restrictions on the movement of capital under Article 40 of the EEA Agreement do not apply in respect of the disputed national legislation due to exemptions provided in point 10 of Annex VIII and point 1(h) of Annex XII of the EEA Agreement. Furthermore, the Norwegian Government has provided further information by email, outlining in greater detail the legal framework and the history thereof.

The Authority notes that Norway may avail itself of derogations from the right of establishment by non-nationals in its fisheries sector, *cf.* Annex VIII, and a similar derogation with regard to investment in the fisheries sector, *cf.* Annex XII.

The case at hand concerns specific provisions regulating ownership restrictions in the fishery sector (Annexes VIII and XII EEA) and therefore, regulating to what extent the contracting parties may continue to apply restrictions on establishment and capital movements in the fishery sector.

##### **Annex XII – Free movement of capital**

Annex XII contains the provisions necessary to implement Article 40 EEA. Under point No. 1(h) Norway may continue to apply restrictions existing on the date of signature of the Agreement, on ownership by non-nationals of fishing vessels, including those catching/fishing crab. These restrictions shall not prevent investments by non-nationals in land-based fish processing or in companies which are only indirectly engaged in fishing operations.

##### **Annex VIII – Freedom of establishment**

Annex VIII, point 10, allows restrictions on establishment of, on the one hand, “non-nationals in fishing operations”, and, on the other hand, “companies owning or operating fishing vessels”. On the basis of these derogations, Norway can require that ownership of fishing companies and vessels remain in the hands of Norwegian nationals, that fishing vessels are registered and fly a Norwegian flag and that fish caught in its waters is brought to and processed in Norway.

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<sup>9</sup> See, for example, Case C-221/89, *Factortame and Others*, ECLI:EU:C:1991:320 and Case C-299/02, *Commission v Netherlands*, ECLI:EU:C:2004:620.

These provisions permit Norway to uphold discriminatory and restrictive rules in relation to fishing operations and fishing vessels and the measures necessary to enforce the rules, as for instance regards quota allocations.

The Authority notes that Annex VIII point 10 concerns establishment within “fishing operations”. The term “*fishing operations*” is not defined in the Agreement. In fisheries, living marine resources are exploited and extracted from fresh or salt waters for the purposes of food exploitation. The term “*fishing*” in a commercial context usually refers to the commercial exploitation of living marine resources by fishing vessels.<sup>10</sup> The Authority is of the opinion that snow crab catching must be classified as “*fishing operations*”.

Thus, the Authority has concluded that the sectoral adaptations for establishment (cf. Annex VIII point 10) are also applicable to snow crab catching.

The Norwegian legislation concerning fishing vessels may deviate from the principles laid down in Articles 31 and 40 of the EEA Agreement, but only within the limits provided by the mentioned adaptations in Annex VIII, point 10 and Annex XII, point 1(h).

As snow crab catching is considered to fall within the term “fishing operations”, it is necessary to address whether the restriction in question existed at the date of signature of the EEA Agreement.

In its letter of 27 March 2017, the complainant states that the relevant legislation was adopted after the signature date of the EEA Agreement. Specifically, the Participation Act was adopted on 26 March 1999 by the Department of Primary Industry and Fisheries and entered into force on 1 January 2000. The provisions for prohibition of snow crab catching were adopted on 19 December 2014. Thus, the complainant is of the opinion that the exemptions do not apply to the disputed legislation.

The Authority, however, notes that the Participation Act represents a continuation and consolidation of previously applicable requirements. Section 2 of the Participation Act provides that the Act is applicable to commercial fishing and fishing/catching operations and other harvesting of wild life marine resources. Section 3 thereof defines “*commercial fishing and harvesting*” as occurring when a person has this as a career/business exclusively or in conjunction with other activities. The scope is equivalent to that of the Act’s predecessor(s).<sup>11</sup> Section 5 of the Participation Act contains nationality requirements, restricting licences to Norwegian citizens and businesses equivalent to Norwegian citizens, yet providing for certain exceptions.

The preparatory works to the Participation Act<sup>12</sup> explain that the purpose of the Act was to merge five acts into one in order to simplify the subject matter. The previous provisions regulating commercial licences, Section 4 of Act of 16 June 1972, contained equivalent rules regarding nationality requirements. As it appears from the preparatory works to this document,<sup>13</sup> the currently applicable Participation Act constitutes a continuation of the

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<sup>10</sup> See the FAO’s definition of „*fishing vessel*„ in its Corporate Document repository concerning fishing operations, accessible under the following hyperlink:

<http://www.fao.org/docrep/003/W3591E/w3591e03.htm>

<sup>11</sup> See Sections 1-2 of Act of 5 December 1917 no 1 read in conjunction with Sections 1-4 of Act of 16 June 1972 no 57.

<sup>12</sup> Ot prp nr 67 (1997-98) Om lov om retten til å delta i fiske og fangst (deltakerloven) on pages 5-6.

<sup>13</sup> Ot prp nr 67 (1997-98) Om lov om retten til å delta i fiske og fangst (deltakerloven) on page 44 onwards.

nationality requirements in relation to commercial fishing/catching of live marine resources/animals, which pre-dates the entry into force of the EEA Agreement.

In other words, since before the entry into force of the EEA Agreement, Norway has had nationality restrictions on professional fishing/catching of marine resources/animals, applicable to all commercial fishing/catching operations irrespective of which marine species is being fished/caught.

By letter of 22 May 2017, the Internal Market Affairs Directorate informed the complainant of its intention to propose to the Authority that the case be closed. The complainant was invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 23 June 2017.

By letter of 23 June 2017, the complainant replied to that letter. In the complainants' letter, it is stated:

“... we do not agree that mere ‘equivalent’ rules adopted after signing of the EEA Agreement may be considered to be ‘restrictions existing on the date of signature the Agreement’. We are of opinion that the restrictions, adopted after the signing of the EEA Agreement, may benefit from the exemption enshrined under Point 10 of Annex VIII and Point 1(h) of Annex XII of the EEA Agreement only if the wording of legal acts is identical to the wording of the legal acts in force on the date of signature the EEA Agreement.

In other words, for the restrictions set in domestic legislation adopted after signing of the EEA Agreement to fall under exemptions set under Point 10 of Annex VIII and Point 1(h) of Annex XII of the EEA Agreement, these restrictions must meet the “as is on 17 March 1993” legal test, i.e. the wording has to be identical and coincide on a word for word basis.”

The Authority, however, notes that, as regards the Agreement's acceptance of “existing restrictions”, there is no requirement that such restrictions must remain in verbatim the same, nor that such restrictions must remain in the exact same legislative form/act.

In the Authority's opinion, it is sufficient for the purposes of establishing whether the restrictions in fact were in existence at the time of signature of the EEA Agreement, that the restrictions are substantially equivalent. That test is indubitably met in the present case as, as already pointed out, equivalent rules regarding nationality requirements to those criticised by the complainants were contained in legislation dating back at least to 1972, notably the provisions regulating commercial licences in Section 4 of Act of 16 June 1972.

In light of the above, the Authority is of the opinion that Annex VIII point 10 and Annex XII exempt snow crab catching in Norway from the provision of Articles 31 and 40 EEA.

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with Article 31 EEA, is hereby closed.

For the EFTA Surveillance Authority

Sven Erik Svedman  
President

Frank J. Büchel  
College Member

*This document has been electronically signed by Sven Erik Svedman, Frank J. Buechel.*