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Case No: 86112  
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Decision No: 039/25/COL

## **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 concerning Iceland's failure to fulfil its notification obligation under Article 8(1) of Directive 98/34, now Article 5(1) of Directive 2015/1535**

## 1 Introduction

On 10 May 2023, the EFTA Surveillance Authority (“the Authority”) issued a letter of formal notice to Iceland,<sup>1</sup> concluding that Iceland had failed to fulfil its notification obligations under Article 8(1) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations<sup>2</sup> (“the Directive” or “Directive 98/34”) in respect of the following national legal act:

- Regulation No 432/2018 – *Reglugerð um (6.) breytingu á reglugerð nr. 543/2002, um möskvastærðir og útbúnað varpna til veiða á botnfiski, rækju og humri* (Regulation on the (6<sup>th</sup>) amendment to Regulation No 543/2002 on mesh sizes and equipment of nets for catching demersal fish, shrimp and lobster, “Regulation No 432/2018”).

Directive 98/34 was repealed by Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (“Directive 2015/1535”).<sup>3</sup> As set out in its Recital 1, Directive 2015/1535 is a codification of Directive 98/34, and largely entails the same substantive obligations. Pursuant to Article 10(2) of Directive 2015/1535, referring to the Correlation Table set out in Annex IV, references to Directive 98/34 are to be construed as references to Directive 2015/1535.

The Authority, in this reasoned opinion, refers to both: Directive 98/34, which was applicable at the time of the adoption of Regulation No 432/2018, and Directive 2015/1535, which is currently applicable. The Authority notes that the obligations of the EEA EFTA States continue to be the same as regards notably the obligation to notify technical regulations to the Authority and the definition of what constitutes a technical regulation. Thus, the Authority is of the view that the Icelandic Government’s arguments and reasoning with regard to the EEA EFTA States’ obligations are equally applicable to both Directives.<sup>4</sup>

Furthermore, it is established case law of the Court of Justice of the European Union (“CJEU”) that the Commission has standing to seek a declaration that a Member State has failed to fulfil its obligations which were created in the original version of an EU measure, subsequently amended or repealed, and which were maintained in force by a new EU measure. However, the subject matter of the dispute cannot be extended to obligations arising under the new provisions which do not correspond to those arising under the original version of the measure in question.<sup>5</sup>

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<sup>1</sup> Doc No 1312944.

<sup>2</sup> The Act then referred to at point 1 of Chapter XIX of Annex II to the EEA Agreement, as amended and as adapted to the EEA Agreement. The Directive was incorporated to the EEA Agreement by Decision of the EEA Joint Committee No 146/1999 of 5 November 1999 (OJ L15, 18.1.2001, p. 40).

<sup>3</sup> The Act is currently referred to at point 1 of Chapter XIX of Annex II to the EEA Agreement, as amended and as adapted to the EEA Agreement. Directive 2015/1535 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 75/2019 of 29 March 2019 (OJ L 210, 2.7.2020, p. 45) and became applicable to the EEA EFTA States on 1 December 2019.

<sup>4</sup> See Case E-13/23 *ESA v Norway*, judgment of 20 December 2024, not yet reported, paragraph 64, where the EFTA Court held that the purpose of the pre-litigation procedure is to give the EFTA State concerned an opportunity, on the one hand, to comply with its obligations under EEA law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Authority.

<sup>5</sup> See *inter alia* Case C-336/16 *Commission v Poland*, EU:C:2018:94, paragraph 44, Case C-488/15 *Commission v Bulgaria*, EU:C:2017:267, paragraph 52 and Case C-363/00 *Commission v Italy*, EU:C:2003:335, paragraph 22.

As noted above, this reasoned opinion only concerns provisions of Directive 98/34 that have been maintained in Directive 2015/1535.

## 2 Correspondence

The Authority sent a letter to the Icelandic Government on 13 January 2021,<sup>6</sup> inquiring about several regulations adopted in 2018 that were potentially non-notified technical regulations within the meaning of Directive 98/34, adopted in 2018. The present reasoned opinion concerns Regulation No 432/2018, but the letter of 13 January 2021 also concerned Regulation No 669/2018 (*Reglugerð um (7.) breytingu á byggingarreglugerð, nr. 112/2012*, “Regulation No 669/2018”) and Regulation No 729/2018 (*Reglugerð um röraverkpalla*, “Regulation No 729/2018”), which are not of relevance for the present reasoned opinion.

The Icelandic Government responded to the Request for Information by letter dated 17 February 2021.<sup>7</sup>

Regarding Regulation No 432/2018, the Icelandic Government argued that the technical requirements relating to minimum mesh sizes for shrimp trawls set out in Article 1 are not EEA relevant as they form an integral part of and are inseparable from the Icelandic fisheries policy that falls outside the scope of the EEA Agreement. Hence, such technical requirements were, according to the Icelandic Government, not subject to notification under the Directive.

On 10 May 2023, the Authority issued a letter of formal notice to Iceland,<sup>8</sup> concluding that by failing to notify certain technical regulations to the Authority, Iceland had failed to fulfil its obligations under Article 8(1) of Directive 98/34 in respect of Regulation No 432/2018.<sup>9</sup>

The case was discussed at the Package meeting in Iceland in June 2023. At the meeting, the Icelandic Government maintained its previous position that regulating mesh sizes was inseparably linked to the Icelandic fisheries policy and outside the scope of the EEA Agreement. In support of this position, the Icelandic Government noted that the European Commission had adopted technical rules concerning mesh sizes with reference to the European Union’s fisheries policy.

By letter dated 9 August 2023,<sup>10</sup> the Icelandic Government replied to the letter of formal notice. In its reply, the Icelandic Government reiterated its position that it is not obliged to notify the requirements for shrimp trawls set out in Article 1 of Regulation No 432/2018 under Directive 98/34 as the rules on mesh sizes for shrimp trawls form an internal and inseparable part of the Icelandic fisheries policy that falls outside the scope of the EEA Agreement.

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<sup>6</sup> Doc No 1170741.

<sup>7</sup> Doc No 1181550. With regard to Regulation No 669/2018, the Icelandic Government acknowledged that it contained technical requirements and should have been notified. As regards Regulation No 729/2018, the Icelandic Government stated in letter dated 29 April 2021 (Doc No 1198290) that it did not object to the assessment by the Authority that may constitute a technical regulation within the meaning of the Directive. Accordingly, the Government undertook to send a notification regarding the regulation to the Authority. On 9 July 2021, the Authority received the notification from Iceland (DTR 2021/9013/IS).

<sup>8</sup> Doc No 1312944.

<sup>9</sup> In addition, the letter of formal notice concluded that Iceland had failed to fulfil its obligations under Article 8(1) of Directive 98/34 in respect of Regulations 669/2018. On 24 July 2023, the Icelandic Government notified Regulation No 669/2018 to the Authority (DTR 2023/9008/IS).

<sup>10</sup> Doc No 1392133.

### 3 Arguments put forward by the Icelandic Government

The Icelandic Government has contended in its correspondence with the Authority that a technical specification regulating shrimp trawls falls outside the scope of the EEA Agreement as such a measure is an integral part of the Icelandic fisheries policy. Therefore, Iceland is not required to notify Regulation No 432/2018 to the Authority in accordance with Article 8(1) first subparagraph of Directive 98/34.<sup>11</sup>

In particular, the Icelandic Government maintained that the technical specification in the regulation in question is simply an implementing tool of the Icelandic fishery policy to protect juvenile fish from capture within the Icelandic Exclusive Economic Zone and is an integral part of Iceland's responsible fisheries policy of sustainable yield of fish stocks. The set requirements are therefore a fundamental tool for controlling catches and an integral part of the Icelandic fisheries policymaking.

The Icelandic Government points out that the underlying reason for leaving the fishery sector outside the scope of the EEA Agreement was *inter alia* for EEA States to be able to regulate their respective fisheries unaffected by the rules of the EEA. The Icelandic Government furthermore notes that similar rules concerning restrictions on gear and conditions for fishing gear and methods, including minimum mesh sizes, are set out in Regulation (EU) 2019/1241<sup>12</sup> within the regulatory framework of the Common Fisheries Policy, which falls outside the EEA Agreement and in which the EEA EFTA States have no participation.<sup>13</sup>

If such rules were to be subject to the notification obligation, the Icelandic Government asserts that this would circumscribe Iceland's exclusive competence over its fishery policy. When assessing whether a national measure laying out a technical specification is subject to a notification, it is the nature of the technical specification which needs to be assessed, not the product it pertains to.

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<sup>11</sup> The Icelandic Government's reasoning for this position is set out in its letters of 17 February 2021 and 9 August 2023, referred to above, and similarly in the context of Case No 75557 concerning seine fishing nets, in particular the response of the Icelandic Government of 11 September 2019 (Doc No 1088503) to the Authority's reasoned opinion in that case, which the Icelandic Government referred to in its letter of 17 February 2021.

<sup>12</sup> Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005 (OJ L 198, 25.7.2019, p. 105–201).

<sup>13</sup> In that regard, it should also be noted that the Icelandic Government also argues that while technical specifications in EU law do not require notification under the Directive, it is an indication of how the EU views such technical requirements under the Common fisheries policy. Regulation (EU) 2019/1241 has not to the Icelandic Government's knowledge been notified as a technical regulation under the World Trade Organisation's ("WTO") rules. The Authority is of the view that this argument is immaterial from an EEA law point of view. While the two systems are similar, they are not exactly the same when it comes to the notification obligation. An important difference is that according to Article 2.9 of the WTO Agreement on Technical Barriers to Trade Members shall notify a technical regulation if "a relevant international standard does not exist or the technical content of a proposed technical regulation is not in accordance with the technical content of relevant international standards, and if the technical regulation *may have a significant effect on trade of other Members*" (emphasis added). Contrary to what is the requirement under the WTO regime, Directives 98/34 and 2015/1535 do not have a *de minimis* threshold for notifications of technical regulations.

According to the Icelandic Government, its arguments are supported by the case law of the EFTA Court in Case E-4/04, *PediceL*,<sup>14</sup> Case E1/16, *Synnøve Finden*,<sup>15</sup> and Case E-12/16, *Marine Harvest*.<sup>16</sup>

The Icelandic Government further argues that, otherwise, national measures regulating Icelandic fisheries policy would effectively fall within the scope of the EEA Agreement. In such a scenario, the rules on mesh sizes would become subject to the provisions of the EEA Agreement, including the notification requirements stipulated under the Directive and the procedures set forth therein. This, in turn, would allow other Contracting Parties, the Authority, the Commission, and the committees referenced in the Directive to scrutinise Icelandic fisheries policy.

#### 4 Relevant EEA law

Article 8(3) of the EEA Agreement reads:

*3. 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 ("HS Code"), excluding the products listed in Protocol 2;*

*(b) products specified in Protocol 3, subject to the specific arrangements set out in that Protocol.*

Article 23 of the EEA Agreement reads:

*Specific provisions and arrangements are laid down in:*

*(a) Protocol 12 and Annex II in relation to technical regulations, standards, testing and certification;*

*(b) Protocol 47 in relation to the abolition of technical barriers to trade in wine;*

*(c) Annex III in relation to product liability.*

*They shall apply to all products unless otherwise specified.*

When Regulation No 432/2018 was adopted in Iceland, Article 1(1), (3-4) and (11)-(12) of Directive 98/34, as adapted to the EEA Agreement,<sup>17</sup> read:

*For the purposes of this Directive, the following meanings shall apply:*

*(1) 'product', any industrially manufactured and any agricultural product, including fish products;*

*(3) 'technical specification', a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing*

<sup>14</sup> Case E-4/04 *PediceL AS v Sosial- og helsedirektoratet* [2005] EFTA Ct. Rep. 1.

<sup>15</sup> Case E-1/16 *Synnøve Finden AS v Staten v/Landbruks- og matdepartementet* [2016] EFTA Ct. Rep. 931.

<sup>16</sup> Case E-12/16 *Marine Harvest ASA v EFTA Surveillance Authority* [2017] EFTA Ct. Rep. 807.

<sup>17</sup> By Joint Committee Decisions No 146/1999 (OJ L15, 18.1.2001, p. 40) and No 16/2001 (OJ L 117, 26.4.2001, p. 16).

and test methods, packaging, marking or labelling and conformity assessment procedures.

*The term 'technical specification' also covers production methods and processes used in respect of products intended for human and animal consumption, and medicinal products as defined in Article 1 of Directive 65/65/EEC, as well as production methods and processes relating to other products, where these have an effect on their characteristics;*

*(4) 'other requirements', a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;*

*(11) 'technical regulation', technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a [EEA] State or a major part thereof, as well as laws, regulations or administrative provisions of [EEA] States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.*

*De facto technical regulations include:*

*— laws, regulations or administrative provisions of a [EEA] State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,*

*— voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications,*

*— technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.*

*[...]*

*(12) 'draft technical regulation', the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made;*

Article 8(1) of Directive 98/34, as adapted to the EEA Agreement,<sup>18</sup> read:

<sup>18</sup> EEA Joint Committee Decisions No 146/1999 (OJ L15, 18.1.2001, p. 40) and No 16/2001 (OJ L 117, 26.4.2001, p. 16).

*Subject to Article 10, [EFTA] States shall immediately communicate to the [EFTA Surveillance Authority] any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the [EFTA Surveillance Authority] have a statement of the grounds which make the enactment of such a technical regulation necessary, where these have not already been made clear in the draft.*

*Where appropriate, and unless it has already been sent with a prior communication, [EFTA] States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned, should knowledge of such text be necessary to assess the implications of the draft technical regulation. A full text of the draft technical regulation notified shall be made available in the original language as well as in a full translation into one of the official languages of the European Community.*

*[EFTA] States shall communicate the draft again under the above conditions if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.*

*[...]*

The first indent of Article 10(1) of Directive 98/34 read:

*Articles 8 and 9 shall not apply to those laws, regulations and administrative provisions of the [EFTA] States or voluntary agreements by means of which [EFTA] States:*

- *comply with binding Community acts which result in the adoption of technical specifications or rules on services,*

Article 1(1)(a), (c)-(d) and (f)-(g) of Directive 2015/1535, as adapted to the EEA Agreement,<sup>19</sup> read:

*For the purposes of this Directive, the following definitions apply:*

- (a) *'product' means any industrially manufactured product and any agricultural product, including fish products;*
- (c) *'technical specification' means a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.*

*The term 'technical specification' also covers production methods and processes used in respect of agricultural products, as referred to in the second subparagraph of Article 38(1) of the Treaty on the Functioning of the European Union (TFEU), products intended for human and animal consumption, and medicinal products as defined in Article 1 of Directive 2001/83/EC of the European Parliament and of the Council (5), as well as production methods and processes relating to other products, where these have an effect on their characteristics;*

<sup>19</sup> EEA Joint Committee Decision No 75/2019 (OJ L 210, 2.7.2020, p. 45).

- (d) *'other requirements' means a requirement, other than a technical specification, imposed on a product for the purpose of protecting, in particular, consumers or the environment, and which affects its life cycle after it has been placed on the market, such as conditions of use, recycling, reuse or disposal, where such conditions can significantly influence the composition or nature of the product or its marketing;*
- (f) *'technical regulation' means technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.*

*De facto technical regulations shall include:*

- (i) *laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions;*
- (ii) *voluntary agreements to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements or rules on services, excluding public procurement tender specifications;*
- (iii) *technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services; technical specifications or other requirements or rules on services linked to national social security systems are not included.*

*[...]*

- (g) *'draft technical regulation' means the text of a technical specification or other requirement or of a rule on services, including administrative provisions, formulated with the aim of enacting it or of ultimately having it enacted as a technical regulation, the text being at a stage of preparation at which substantial amendments can still be made.*

Article 5(1) of Directive 2015/1535, as adapted to the EEA Agreement,<sup>20</sup> reads:

*Subject to Article 7, [EFTA] States shall immediately communicate to the Commission any draft technical regulation, except where it merely transposes the full text of an international or European standard, in which case information regarding the relevant standard shall suffice; they shall also let the [EFTA Surveillance Authority] have a statement of the grounds which make the enactment of such a technical regulation necessary, where those grounds have not already been made clear in the draft.*

<sup>20</sup> EEA Joint Committee Decision No 75/2019 (OJ L 210, 2.7.2020, p. 45).



*Where appropriate, and unless it has already been sent with a prior communication, [EFTA] States shall simultaneously communicate the text of the basic legislative or regulatory provisions principally and directly concerned to the Commission, should knowledge of such text be necessary to assess the implications of the draft technical regulation. A full text of the draft technical regulation notified shall be made available in the original language as well as in a full translation into one of the official languages of the Union.*

*[EFTA] States shall communicate the draft technical regulation again to the [EFTA Surveillance Authority] under the conditions set out in the first and second subparagraphs of this paragraph if they make changes to the draft that have the effect of significantly altering its scope, shortening the timetable originally envisaged for implementation, adding specifications or requirements, or making the latter more restrictive.*

*[...]*

Article 7(1)(a) of Directive 2015/1535 reads:

*Articles 5 and 6 shall not apply to those laws, regulations and administrative provisions of the [EFTA] States or voluntary agreements by means of which [EFTA] States:*

*(a) comply with binding Union acts which result in the adoption of technical specifications or rules on services;*

## **5 The Authority's assessment**

Article 8(1) first subparagraph of Directive 98/34, now Article 5(1) of Directive 2015/1535, requires the EEA EFTA States to notify the Authority of all draft technical regulations, unless such regulations fall under one of the exceptions set out in Article 10 of Directive 98/34, now Article 7 of Directive 2015/1535.

It is uncontested that Regulation No 432/2018 was not notified to the Authority in accordance with Article 8(1) first subparagraph of Directive 98/34. Nor have the rules been notified to the Authority under Article 5(1) of Directive 2015/1535.

Regulation No 432/2018 entered into force on 30 April 2018 and contained technical regulation for the minimum mesh size for shrimp trawls within the meaning of, at that time, Article 1(11) of Directive 98/34,<sup>21</sup> cf. now Article 1(1)(f) of Directive 2015/1535.

As already set out above, the Icelandic Government's main argument is that a technical specification such as the one at hand in this case regulating shrimp trawls falls outside the scope of the EEA Agreement as such measure is an integral part of the Icelandic fisheries policy.

The Authority's position is that pursuant to Article 8(3)(a) of the EEA Agreement, the provisions of the EEA Agreement apply only to products falling within Chapters 25 to 97 of the Harmonized Commodity and Coding System ("the HS Code"), excluding the products

<sup>21</sup> Article 1 of Regulation No 432/2018 sets out that the minimum mesh size of a shrimp trawls must be 45 mm in the wings back to the front net roof (center net) and 36 mm in other parts of the shrimp trawl. The Article then sets further specific requirements for shrimp trawls depending on the fishing area.

listed in Protocol 2. Made-up fishing nets fall under Chapter 56 of the HS Code (HS Code 5608.11). It is the Authority's view that shrimp trawls fall within this scope.<sup>22</sup> Hence, made-up fishing nets such as shrimp trawls are industrial products that fall within the product coverage of the EEA Agreement, and technical requirements for that product should be notified.

The Authority emphasises that as made-up fishing nets such as shrimp trawls fall within the product scope of the EEA Agreement, the legal context is different to that in the judgments of the EFTA Court in *Pedicef* and *Synnøve Finden*, referred to by the Icelandic Government. In those cases, the products in question *fell outside* the product scope of Article 8(3) of the EEA Agreement. Therefore, any service or national measure inseparably linked to the sale or trade of those products was found to fall outside the scope of the EEA Agreement. Similarly, the judgment in *Marine Harvest* concerned the Authority's competence to perform surveillance of State aid to the fisheries sector itself, which in principle falls outside the scope of the EEA Agreement, with the exceptions provided for in the Agreement.

Furthermore, in all of the judgments referred to above, the EFTA Court concluded that the reason for excluding certain goods from the scope of the EEA Agreement was that the Contracting Parties wished to maintain the freedom to decide on their respective regulations for these products unaffected by the rules contained in the EEA Agreement.<sup>23</sup> Moreover, in *Synnøve Finden* and *Marine Harvest* the Court stated that for any EEA rule to apply to products excluded from the product scope of the EEA Agreement, a specific legal basis in EEA law is required.<sup>24</sup>

It follows that, at the time of the signing of the EEA Agreement, it was the intention of the Contracting Parties that the products referred to in Article 8 of the Agreement, including made-up fishing nets such as shrimp trawls, would be subject to EEA rules.

This conclusion is not affected by the fact that the fisheries sector is, in principle, excluded from the scope of the EEA Agreement. The Contracting Parties wished to shield the fishing industry in the EEA EFTA States from the EU's Common Fisheries Policy, leaving the regulation of that industry outside the general scope of the EEA Agreement. That consideration, however, concerned only the fisheries sector as such and not all parts of industrial society that deliver goods and services to that sector. This is reflected in the specific inclusion in Article 8(3) of the EEA Agreement of industrial products used in the fisheries sector, such as shrimp trawls.

In *Pedicef*, the EFTA Court concluded that advertising services inseparably linked to the trade in wine, which fell outside the product scope of the EEA Agreement, were not covered by Article 36 EEA on the free movement of services. In addition, the EFTA Court held that its reasoning that Article 36 EEA did not apply to the advertisement of wine would not extend to services which were *not* inseparably linked to the trade in goods not covered by the EEA Agreement. In that case, the Authority had argued that by the same principle, any goods used in relation to the wine industry would similarly escape the application of free movement of goods provisions, such as tractors and bottles. The EFTA Court did not share

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<sup>22</sup> While the HS Code is the correct term of reference as regards the EEA Agreement, it is noted for comparison that the Icelandic customs code classifies shrimp trawls under code 5608.1103.

<sup>23</sup> See Case E-4/04 *Pedicef AS v Sosial- og helsedirektoratet*, cited above, paragraph 25; Case E-1/16 *Synnøve Finden AS v Staten v/Landbruks- og matdepartementet*, cited above, paragraph 56 and Case E-12/16 *Marine Harvest ASA v EFTA Surveillance Authority*, cited above, paragraph 65.

<sup>24</sup> Case E-1/16 *Synnøve Finden AS v Staten v/Landbruks- og matdepartementet*, cited above, paragraph 57 and Case E-12/16 *Marine Harvest ASA v EFTA Surveillance Authority*, cited above, paragraph 66.

this concern, stating that such products fell within the product coverage of the EEA Agreement.<sup>25</sup>

The Authority recalls that the aim of Directives 98/34 and 2015/1535 is to prevent the creation of unjustified trade barriers by providing for increased transparency as regards the adoption of technical rules within the EEA States and thus to better ensure the functioning of the internal market, cf. Recitals 3, 7 and 9 of both directives.

As regards the Icelandic Government's argument that similar rules concerning restrictions on gear and conditions for fishing gear and methods, including minimum mesh sizes, are set out in Regulation (EU) 2019/1241, the Authority notes that the first indent of Article 10(1) of Directive 98/34 provided for an exemption to the notification obligation set out in the Directive when technical specifications were adopted in order to comply with binding Community acts. The same exception applies under Article 7(1)(a) of Directive 2015/1535.

It follows that the EU Member States are not obliged to notify a technical specification set out in Regulation (EU) 2019/1241, as all those States are bound by the same technical rule which is directly applicable in the EU and will thus not result in an obstacle to the proper functioning of the internal market.

In the Authority's view it is irrelevant for the present case that the legal basis for the adoption of the technical regulations set out in Regulation (EU) 2019/1241 is the European Union's common fisheries policy. If rules adopted in that context involve products that explicitly fall under the product scope of the EEA Agreement, that does not automatically mean that those products are excluded from the product scope of the EEA Agreement.

The Authority notes that Regulation (EU) 2019/1241 does not provide for full harmonisation of the EU rules as regards requirements for fishing gear as it allows for some exemptions from the specifications set out therein.

Furthermore, Article 19 of Regulation (EU) No 1380/2013<sup>26</sup> provides that the EU Member states may adopt more stringent national measures applicable to fishing vessels flying their flag or to persons established in their territory for the conservation of fish stocks in the Union, as long as those measures fulfil certain requirements.

The Authority notes the EU Member States have indeed notified measures under Directive 98/34 as well as Directive 2015/1535 concerning equipment that, to a certain extent, falls under Regulation (EU) 2019/1241 or its predecessor,<sup>27</sup> e.g. when these States want to subject a larger number of fishing vessels to the requirements set out under Regulation 2019/1241 or where that regulation allows for stricter rules to be adopted. Similarly, the EU Member States have notified measures that involve products that are used in the field of fisheries.<sup>28</sup>

<sup>25</sup> See Case E-4/04 *Pedice AS v Sosial- og helsedirektoratet*, cited above, paragraphs 37 and 38.

<sup>26</sup> *Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC* (OJ L 354, 28.12.2013, p. 22–61).

<sup>27</sup> See for example notifications Nos 2024/0238/SE concerning amendments to the Swedish National Board of Fisheries regulations on fishing in Skagerrak, Kattegat and the Baltic Sea; 2022/0312/S concerning fishing in Skagerrak, Kattegat and the Baltic Sea; 2020/0004/S concerning amendments to the Swedish National Board of Fisheries regulations on fishing in the Skagerrak, Kattegat and Baltic Sea; 2016/0667/UK concerning the regulation of scallop fishing (Scotland) order 2017; and 2006/0616/UK concerning the undersized bass order 2007.

<sup>28</sup> See for example notification Nos 2021/0001/BG concerning the law on fisheries and aquaculture (later withdrawn); 2000/0685/DK concerning the construction and equipping etc. of ships; 2022/0337/A concerning amendments to the Carinthian Fisheries Act; 2020/0821/FIN concerning fishing vessels; 2013/0678/UK concerning inshore vessel monitoring system; 2010/0534/UK

It is the Authority's view that even if an EU *acquis* containing technical regulations of relevance to the Common Fisheries Policy, such as Regulation (EU) 2019/1241, is not incorporated into the EEA Agreement, the EEA States must nevertheless notify similar measures under Directive 2015/1535, as those national rules do not fall under the exemption in Article 7(1)(a) of Directive 2015/1535 (previously Article 10(1) first indent of Directive 98/34).

The Authority also notes that the Icelandic Government has previously notified similar measures, such as rules governing the design and construction of juvenile fish excluders (notification No 2005/9011/IS), as well as rules concerning the design and construction of juvenile shrimp excluders (notification No 2005/9012/IS).

In the same manner, the EEA EFTA States frequently notify technical rules involving products that are used in the field of agriculture, fisheries or activities at sea.<sup>29</sup>

Notwithstanding the fact that shrimp trawls do fall within the product scope of the EEA Agreement, the Authority notes that EEA EFTA States are also under an obligation under Directive 2015/1535 – previously under Directive 98/34 – to notify technical rules concerning certain products that do not fall under the product scope of the EEA Agreement. According to the second subparagraph of Article 23 of the EEA Agreement, the rules in Annex II relating to technical regulations, standards, testing and certification apply to all products covered by those rules unless otherwise specified. Article 1(1) of Directive 98/34 defined “product” as “any industrially manufactured and any agricultural product, including fish products” and the exact same definition has been maintained in Article 1(1)(a) of Directive 2015/1535. The Directives were made part of the EEA Agreement without specifying any limitations as regards the products that fall under its scope of application. It is clear from the case law of the EFTA Court that under such circumstances, the relevant EEA legislation applies.<sup>30</sup> Therefore, at the date of the adoption of Regulation 432/2018, the Icelandic Government had an obligation to notify any technical regulation adopted in relation to products falling within the definition in Article 1(1) of Directive 98/34, now Article 1(1)(a) of Directive 2015/1535, to the Authority in accordance with the first subparagraph of Article 8(1) of Directive 98/34, now the first subparagraph of Article 5(1) of Directive 2015/1535.

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concerning national eel fishing (net and traps) byelaws; and 2008/0340/UK concerning the conservation of scallops regulations.

<sup>29</sup> See for example notifications Nos 2024/9002/NO concerning mobile offshore units; 2024/90004/NO concerning regulations on cargo ships intended to carry industrial personnel; 2023/9007/NO concerning amendments to the Regulations on environmental safety for ships and mobile offshore units; 2022/9001/N concerning ships and mobile offshore units; 2021/9012/N concerning fishing vessels of less than 15 metres in length; 2020/9001/N concerning aquaculture facilities for fish; 2020/9021/N concerning amendments to the Regulations on the construction, operation, equipment and surveys of fishing vessels of 15 m in overall length and upwards; 2017/9006/IS concerning the indication of origin for fresh, chilled and frozen meat of fish and other marine products; 2016/9029/N concerning requirements to fishing vessels under 15 meters; 2015/9015/FL concerning animal welfare during breeding; 2014/9018/IS concerning rescue and safety equipment aboard Icelandic ships; 2005/9023/N concerning organic farming; 2005/9013/IS concerning amendments to the rules on the construction and equipment of boats with a length of up to 15 metres; 2004/9015/IS concerning meat and meat products; 2004/9004/N concerning pesticides; 2004/9001/IS concerning the safety of fishing vessels of 15 metres in length overall and over; 2002/9009/IS concerning poultry slaughterhouses, slaughtering and meat inspection; 1999/9010/IS concerning measures to prevent animal diseases from entering into the country and on import restrictions on products from animals that have been given growth stimulants; and 1998/9014/IS concerning seed potatoes.

<sup>30</sup> Case E-2/12 *HOB-vín ehf. v Áfengis- og tóbaksverslun ríkisins*, [2012] EFTA Ct. Rep. 1092, paragraphs 39-49. See also for comparison the conclusion in Case E-17/15 *Ferskar kjötvörur ehf. v the Icelandic State*, [2016] EFTA Ct. Rep. 4, paragraphs 47-49.

Taking all the aforementioned into consideration, the Authority is of the view that the contested measure contains a technical regulation within the meaning of both Directive 98/34 and the currently applicable Directive 2015/1535, which should have been notified to the Authority in accordance with the first subparagraph of Article 8(1) of Directive 98/34, now the first subparagraph of Article 5(1) of Directive, as adapted to the EEA Agreement.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Iceland the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by failing to notify a technical regulation to the Authority, in accordance with its obligations under the Act previously referred to at point 1 of Chapter XIX of Annex II to the EEA Agreement (*Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations*), now the Act referred to at point 1 of Chapter XIX of Annex II to the EEA Agreement (*Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services*) as amended and adapted to the Agreement, Iceland has failed to fulfil its obligations under Article 8(1) of Directive 98/34, now Article 5(1) of Directive 2015/1535 in respect of Regulation No 432/2018 (*Reglugerð um (6.) breytingu á reglugerð nr. 543/2002, um möskvastærðir og útbúnað varpna til veiða á botnfiski, rækju og humri*), adopted in 2018.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Iceland to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels,

For the EFTA Surveillance Authority

Arne Røksund  
President

Stefan Barriga  
College Member

Árni Páll Árnason  
Responsible College Member

Melpo-Menie Joséphidès  
Countersigning as Director,  
Legal and Executive Affairs

*This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.*