

Brussels, 11 July 2012
Case No: 68781
Event No: 593787
Dec. No: 186/12/COL



EFTA SURVEILLANCE
AUTHORITY

Ministry of Fisheries and Coastal Affairs
PO Box 8118 Dep
N-0032 Oslo
Norway

Dear Sir/Madam,

Subject: Letter of formal notice to Norway for failing to comply with its obligations under Articles 31 by maintaining in force ownership restrictions in the fish farming industry

1 Introduction

According to Norwegian law any acquisition resulting in the ownership of between 15 to 25 % of the total concession biomass, is subject to prior authorisation from the Norwegian Ministry of Fisheries under the Fish Farming Regulation. Moreover, the acquisition of more than 25% of the total production capacity is prohibited under the Fish Farming Regulation.

Following a complaint relating to the above ownership control, the EFTA Surveillance Authority (“the Authority”) has assessed the compatibility of the Norwegian rules with Article 31 of the Agreement on the European Economic Area (“EEA”) on the freedom of establishment.

2 Correspondence

By letter dated 14 February 2012 the Internal Market Affairs Directorate (the “Directorate”) set out its preliminary conclusions (Event No 623717). That letter gives a full account of the correspondence of the case prior to the Directorate’s letter of 14 February 2012 (see its Chapter 2).

By letter dated 16 March 2012, the Government of Norway responded to the letter of the Directorate dated 14 February 2012.

By letter of 24 April 2012, the complainant submitted its observations to the mentioned letters from the Directorate and the Government of Norway.

3 Relevant national law

3.1 Regulations on aquaculture concessions and site clearance

- Concessions

An aquaculture concession, and its subsequent registration in the aquaculture registry, is required in order to engage in aquaculture activities. In addition, a special authorisation (*clearance*) for the actual fish farming site must be issued by the competent authorities.

The concession requirement is regulated by Chapter II of Act No. 79/2005 on Aquaculture (*Akvakulturloven*) (“the Aquaculture Act”), see especially Section 4 of the Aquaculture Act, and, as regard the rearing of salmon and trout, Section 5 of Regulation No. 1798/2004. According to Section 6 of the Aquaculture Act the competent ministry may, upon application, grant a concession to engage in aquaculture if certain conditions are met, e.g. related to environmental effects, food safety and spatial planning of the land and sea territory. A concession is linked to a specified administrative region, cf. e.g. Section 33 of Regulation No. 1798/2004.

Concessions may be transferred between private actors in the open market on market terms, cf. Sections 4 and 19 of the Aquaculture Act.

Section 4(b) of Regulation No. 1798/2004 defines “*aquaculture concession*” as a “*concession given under the Aquaculture Act, which upon registration in the aquaculture register gives the right to a certain type of production of a certain specie, to a certain amount, at one or more designated sites*”.

Section 15 of the Regulation stipulates that the maximum permitted amount of biomass per concession is 780 tons¹.

Accordingly, when new concessions are issued by the Ministry of Fisheries and Coastal Affairs (cf. Section 14 of Regulation No. 1798/2004), or the maximum permitted biomass per concession is increased, the overall national amount of permitted biomass (potential production capacity) increases.

- Site clearance

In addition to the aquaculture concession, a specific authorisation (the “*site clearance*”) is required for the actual fish farming site. The “*site clearance*” shall be linked to one or more specified aquaculture concessions. If the amount of biomass on a site is extended – e.g. through the acquisition of one or more concessions belonging to the same geographical defined administrative region – a new clearance must be obtained. A new site clearance must also be obtained if the size of the site is changed. These provisions are laid down in Section 29 of Regulation No. 1798/2004. One aquaculture concession can maximum be exploited at four sites, cf. Section 34 of Regulation No. 1798/2004.

¹ 945 tons if all the production takes place in the counties of Troms and Finnmark.

3.2 Regulations on ownership ceilings

Section 3 of Regulation No. 1800/2004 (FOR 2004-12-22 nr 1800 om kontroll med eiermessige endringer i selskap mv. som innehar tillatelse til oppdrett av matfisk av laks og ørret i sjø) (“the Fish Farming Regulation”), the national measure subject to this letter of formal notice, reads:²

“A permission from the Ministry of Fisheries and Coastal Affairs is required if an acquisition leads to a situation where the buyer gains control of more than 15% of the total concession biomass (“konesjonsbiomasse”). Control is to be understood as direct or indirect ownership of more than half of the owner interests, or that similar control is achieved by other means.

Permission shall not be granted if the acquisition implies that the buyer obtains control of more than 25 % of the total concession biomass.

In the assessment of whether to grant permission to an acquisition the Department shall emphasize whether the acquisition contributes to achieving the national objectives for the industry, including the increase in the value of Norwegian export of fish, the increase in value creation, and to achieving the potential of the industry as a whole. Further, if the acquisition contributes to maintaining the industry as a profitable and vigorous coastal industry.

The Ministry may in each case set terms and conditions that it finds necessary to secure the motives and goals which this regulation is meant to promote.”³

(Office translation)

² The headline of Section 3 of Regulation No. 1800/2004 is “National ownership limitation” (“Nasjonal eierbegrensning”). In the authentic Norwegian version it reads: :

”Det må innhentes tillatelse fra departementet dersom et erverv vil medføre at erververen får kontroll med mer enn 15% av samlet konsesjonsbiomasse. Med kontroll menes direkte eller indirekte eierskap til mer enn halvparten av eierinteressene, eller at det på annen måte oppnås tilsvarende kontroll.

Det kan ikke gis tillatelse til erverv som innebærer at erververen vil kontrollere mer enn 25% av samlet konsesjonsbiomasse.

I vurderingen av om tillatelse skal gis skal det legges vekt på om ervervet bidrar til å oppnå nasjonale målsetninger for næringen, herunder å øke verdien av norsk fiskeeksport, økt verdiskapning og å utløse næringens potensial som helhet. Videre om ervervet bidrar til å opprettholde næringen som en lønnsom og livskraftig kystnæring.

Departementet kan sette de vilkår som i hvert enkelt tilfelle finnes påkrevd av hensyn til de formål som denne forskriften skal fremme.”

³ Unless otherwise specified, the Authority’s assessment concerns all paragraphs and provisions of Section 3 of the Fish Farming Regulation. The provisions of Section 3 of the Fish Farming Regulation will also be referred to as the “national measures”.

4 EEA law

Article 31 EEA 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 is a special provisions in point 10 of Annex VIII (sectoral adaptation) concerning adaptations to the freedom of establishment⁴ for the fisheries sector in Norway:

“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”.

5 The Authority's assessment

The subject of this letter of formal notice are the limitations upon how much of the total concession biomass a market player can control, as laid down in Section 3 of Regulation No. 1800/2004. This letter does not address the systems of concessions and “site clearance”.

5.1 Which freedoms are applicable?

5.1.1 The free movement of goods

With reference to the judgment of the EFTA Court in the *Pedical*-case⁵ as well as to case law of the Court of Justice of the European Union (Court of Justice)⁶, the Norwegian

⁴ Point 1(h) of Annex XII on capital movements contains a related adaptation concerning investments in fishing vessels.

⁵ Case E-4/04 *Pedical* [2005] EFTA Court Report p. 15.

⁶ Cases C-148/85 *Forest* [1986] ECR I-3449; C-15/79 *Groenveld* [1979] ECR I-3409. Cases C-157/94 *Commission v. Netherlands* [1997] ECR I-5699; C-158/94 *Commission v. Italy* [1997] ECR I-5789; Case C-

Government argues⁷ that Section 3 of the Fish Farming Regulation is a production regulation solely affecting the free movement of goods. Consequently, according to the Norwegian Government, it falls outside the scope of the Agreement, as farmed salmon and trout are not among the products covered by Chapters 25-97 of the Harmonised Commodity and Description and Coding System or Protocol 3, cf. EEA Article 8(3), litra a) and b).

In addition, the Norwegian Government submits that when a product falls outside the product scope of Article 8(3) EEA, the application of the freedoms of establishment, services and capital movements require a concrete legal basis in the EEA Agreement.

The Authority cannot subscribe to these arguments.

- The ownership restrictions do not regulate cross-border flow of products

Firstly, Section 3 of the Fish Farming Regulation has neither the objective nor the effect to limit the cross border flow of products. Hence, even if salmon and trout were part of the product scope of the EEA Agreement, the national measure would not fall under the scope of the rules on free movement of goods. Indeed, the measure is clearly not an import restriction or a measure having an equivalent effect within the meaning of Article 11 EEA. Neither is it a restriction on exports under Article 12 EEA. The Court of Justice has consistently refused to extend the prohibition on export restrictions beyond situations of direct or indirect discrimination of export goods and goods marketed and sold on the domestic market.⁸

- The ownership restrictions do not form an integral part of the trade in salmon and trout

Secondly, it cannot be derived from the judgment in the *Pedicel* case, that Section 3 of the Fish Farming Regulation shall only be assessed under the free movement of goods rules. The *Pedicel* case did, *inter alia*, concern whether the free movement of services rules (Article 36 EEA) were applicable to advertisement services for wine. As the purpose of advertisements for wine is the sale of wine, the application of the rules on the freedom to provide services would have *de facto* circumscribed the EEA States' exclusive competence to regulate trade with wine and other products falling outside the product scope of the EEA Agreement, as set out by Article 8(3). The EFTA Court thus considered that such advertisement services "*form an integral part of, inseparable from, the trade in wine*"⁹ and fall to be assessed under the free movement of goods. The scope of the approach followed in *Pedicel* is very narrow. Indeed, the EFTA Court stated that its reasoning would not extend to services which are not inseparably linked to the trade in goods not covered by the EEA Agreement.¹⁰

159/94 *Commission v. France* [1997] ECR I-5815; C-167/97 *Nilsson* [1998] ECR I-7477; E-5/96 *Ullensaker Municipality and other v. Nille AS* [1997] EFTA Court Report p.30.

⁷ Line of argumentation presented to the Authority by the Norwegian Government in meetings held 11 March and 24 May 2011, and/or in the letter from the Ministry of Fisheries and Coastal Affairs dated 16 March 2012.

⁸ Cases 15/79 *Groenveld* [1979] ECR 3409, paragraph 7; C-388/95 *Belgium v. Spain* [2000] ECR I-3123, paragraphs 41-42; C-205/07 *Gysbrecht* [2008] ECR I-9947, paragraphs 42-44. See also the Opinion of the Advocate General in *Gysbrecht*, paragraphs 41-56.

⁹ Case E-4/04 *Pedicel* [2005] EFTA Court Report p.1, paragraph 35.

¹⁰ Case E-4/04 *Pedicel* [2005] EFTA Court Report p.1, paragraph 38.

It thus follows inherently from the judgment in the *Pedidel* case that the non-inclusion of a product in the product scope of the EEA Agreement, as set out by Article 8(3), does not preclude the application of the other freedoms. This general rule is only departed from when a *service* forms an “*integral part of, inseparable from, the trade in*” the product in question,¹¹ or if a sectoral adaptation covering the situation exists.

The situation in the case at hand differs fundamentally from the one in the *Pedidel* case:

1. Section 3 of the Fish Farming Regulation does not affect trade with salmon or trout.
2. The application of the rules on freedom of establishment to Section 3 of the Fish Farming Regulation would not have any impact on Norway’s exclusive right to regulate trade with salmon or trout (nevertheless subject to the rules of Protocol 9 EEA).
3. If all the national measures regulating establishment and capital movements in the fishery sector were falling outside the scope of the EEA Agreement, sectoral adaptations would be superfluous. It follows from the very existence of the sectoral adaptations of Annexes VIII (establishment) and XII (capital movements) - regulating to what extent Norway and Iceland may continue to apply restrictions on establishment and capital movements in the fishery sector – that the freedoms of establishment and capital movements are, if not covered by the special adaptations, fully applicable, regardless of whether the object of acquisition or investment falls outside the product scope of Article 8(3).

In light of this the Authority concludes that the national measures in this case are not to be assessed under the rules on free movement of goods.

5.1.2 Sectoral adaptations

The Authority has assessed whether the sectoral adaptations for establishment (cf. Annex VIII point 10) are applicable to acquisitions of holdings in aquaculture companies. These provisions permit Norway to uphold discriminatory and restrictive rules in relation to fishing operations and fishing vessels.

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”. Annex VIII refers to the term “fishing operations”. Fishing and aquaculture are two distinct economic activities. In fisheries limited natural resources are exploited and extracted from the fresh or salt waters, whereas in aquaculture, the fish (or other water based animals) are produced and reared at the fish farm up until slaughtering.

The terms “*to fish*” or “*fishing*” usually refer to the catching of live fish. When referring to the operation of catching and killing reared fish, the terms “*slaughtering*” or “*slaughtering process*” are normally used.

In the equally authentic Norwegian language version of Annex VIII the term “*fiske*” is used. According to dictionaries¹² this term normally means the operations and methods of

¹¹ Case E-4/04 *Pedidel* [2005] EFTA Court Report p.1, paragraph 35. See also Case C-452/01 *Ospelt* [2002] ECR I-787, where the CJEU applied Article 40 EEA directly in a case concerning the acquisition by a Liechtenstein citizen of agricultural land in Austria.

¹² *The Oxford Encyclopedic English Dictionary*, Oxford University Press 1991, p. 531; *Bokmålsordboka (web based)*, University of Oslo and the Norwegian language council (“*Språkrådet*”).

catching fish or other water based egg-laying animal for food or for sports, for industrial or leisure purposes.

There exist no relevant legal sources indicating that aquaculture should be covered by the term “fishing operations”/”fiske”. To the extent other legal sources provide guidance, it may be derived that the term “fishing operations” is not intended to cover the whole fisheries sector.¹³

In light of the above, the Authority is of the opinion that Annex VIII point 10 does not exempt aquaculture in Norway from the provisions of Articles 31 EEA. This is in line with the Authority’s previous position¹⁴.

The Norwegian Government has not presented any argument which could call for a reassessment thereof.

In its letter of 16 March 2012, Norway maintains that a dictionary based interpretation of Annex VIII can only be used as a starting point, and that other elements must be taken into account such as the system and objectives of the legal instrument in question and the context in which the wording occurs.

The Authority’s conclusion is based on the wording of the provision, interpreted in light of the context in which it appears, also taking due account of the case law’s instruction to interpret such national derogations and adaptations from the main rules narrowly.¹⁵

This assessment is not altered by findings of the Authority in its decision of 30 October 1996 (“Scottish Salmon Grower Association”) in which the Authority found that aid granted to the aquaculture industry was outside the scope of the Authority’s competences in the field of state aid.¹⁶ It follows from this decision that the Authority does not claim to have the competence to assess state aid to companies involved in the production of goods that fall outside the product scope of the Agreement based on Article 8(3) EEA. The Authority fails to see how the fact that the sector falls outside the scope of the Authority’s state aid control has an influence on the interpretation of the derogations set out in the Annexes.

5.1.3 Restriction on the freedom of establishment

Restrictions on ownership can fall both within the scope of Article 31 EEA (freedom of establishment) and Article 40 EEA (free movement of capital). According to established case law from the Court of Justice¹⁷, the question of whether the national legislation falls

¹³ A comparison of Annex VIII point 10 with Annex VIII point 9, containing related adaptations for Iceland, shows that the wording of the adaptations for Iceland appears to be broader in scope, referring to the *sectors of fisheries and fish processing*, as the areas where Iceland may continue to apply restrictions. In addition, although the Icelandic adaptations appear to be wider in scope, aquaculture is not covered by the provisions implementing these adaptations into the national legal order of Iceland, see Icelandic Act no. 34/1991, as amended. Further, even though the second paragraph of point 1(h) of Annex XII is not, as such, covering aquaculture, it confirms that it was considered to be in Norway’s interest to open for foreign investments in land based sea food industry. The same can be derived from the Norwegian preparatory to the Norwegian Parliament’s ratification of the EEA Agreement.

¹⁴ This conclusion is fully in line with the Authority’s Decision 337/01/COL of 15 November 2001.

¹⁵ C-420/07 *Apostolides v. Orams and Orams* [2009] ECR II-1545 paragraph 35; C-231-79 *Commission v. UK* [1979] ECR 1447, paragraph 13; C-3/87 *Agegate* [1989] ECR 4459, paragraph 39; C-233/97 *Kappahl* [1998] ECR I-8069, paragraph 18; C-49/09 *Commission v. Poland* [2010] Not yet published, paragraph 41; C-462/05 *Commission v. Portugese Republic* [2008] ECR I-4183, paragraph 54.

¹⁶ Decision Nos. 195/96/COL. See also in the same vein Decision 176/05/COL.

¹⁷ See *inter alia* Cases C-524/04 *Test claimants* [2007] ECR I-2107, paragraph 27; C-112/05 *Commission v. Italy* [2009] ECR I-2291, paragraph 34.

within the ambit of the free movement of capital or the freedom of establishment must be assessed in light of the purpose behind the legislation concerned.

National provisions applicable to holdings of the capital of a company which give “*definite influence on the company’s decisions*” and allow them to “*determine its activities*” fall within the substantive scope of the provisions of the freedom of establishment.¹⁸ Acquisition of shares below this threshold by a non-resident constitutes a capital movement within the meaning of Article 40 EEA. The national measures only apply to acquisitions which give the acquirer control of more than 15% of the total concession biomass. The term “control” is defined as “direct or indirect ownership to more than half of the ownership interests, or that equivalent control is achieved by other means.” This indicates that the national measures are meant to apply to investments that give definite influence on the company’s decisions and should, therefore, be assessed under the rules on the freedom of establishment.

Settled case law provides that the freedom of establishment encompasses a general prohibition on restrictions.¹⁹ It has been repeatedly held that national measures which impede or render less attractive the exercise of that freedom are to be considered as restrictions to the freedom of establishment.²⁰

The first paragraph of Section 3 of the Fish Farming Regulation uses the current nationwide total amount of biomass (“concession biomass”/“konesjonsbiomasse”) as a benchmark for how big a share of the currently available concessions a market player is controlling. Section 3 of the Fish Farming Regulation excludes the possibility of expanding the business activities beyond controlling 25 % of the total concession biomass, and hinders the investments, establishment or expansion of activities implying control of more than 15 % of the total concession biomass. For acquisitions giving control of more than 15 % of the overall concession biomass, but below 25 %, Section 3 of the Fish Farming Regulation requires an authorisation from the Ministry. This scheme therefore constitutes a two-fold restriction: In addition to the ban on controlling more than 25 % of the total concession biomass, the requirement of a prior authorisation for the acquisition of holdings giving control of more than 15 % of the concession total, does in itself constitute a restriction.²¹

Hence, the national measures constitute restrictions on the right of establishment as provided for by Article 31.

¹⁸ See *inter alia* Cases C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; C-436/00 *X and Y* [2002] ECR I-10829, paragraph 37; C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 20; C-112/05 *Commission v. Germany* [2007] ECR I-8995, paragraph 13; C-284/06 *Burda* [2008] ECR I-4571, paragraph 72.

¹⁹ C-565/08 *Commission v. Italy* [2011] Not yet published, paragraph 45; C-400/08 *Commission v. Spain* [2011] Not yet published, paragraphs 63-72. C-442/02 *Caixa Bank France* [2004] ECR I-8961, paragraph 11; E-1/04 *Fokus Bank* [2004], EFTA Court Report p.11, paragraph 24-25.

²⁰ See *inter alia* Cases E-2/06 *EFTA Surveillance Authority v. Norway*, EFTA Court Report p.164, paragraph 64; C-439/99 *Trade fair* [2002] ECR I-0305, paragraph 22; C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; C-255/97 *Pfeiffer* [1999] ECR I-2835; C-326/07 *Commission v. Italy* [2009] ECR I-2291, paragraph 56-57.

²¹ Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 38 with further references, paragraph 40; Joined Cases C-515/99, C-515/99 to C-524/99, C-536/99 to C-540/99, *Reisch and Others* [2002] ECR I-2157, paragraph 33; C-400/08 *Commission v. Spain* [2011] Not yet published, paragraph 65; C-570/07 *Blanco Peréz and Chao Gómez* [2010] Not yet published, paragraphs 53 and 54.

5.2 Possible justifications

It is established case law that a restriction on one of the fundamental freedoms of the EEA Agreement can be justified only if the State concerned can show that the relevant measures pursue a legitimate objective in the public interest. Such national measures must also be appropriate for securing attainment of the objective pursued (suitability), and not go beyond what is necessary in order to achieve the legitimate objectives.²²

5.2.1 The justifications invoked

In its contact and correspondence with the Authority, Norway has raised several justification grounds for the restrictions. The main reasons Norway has relied on are:

1. the achievement of a varied industry structure,
2. the promotion of competitiveness and profitability of the industry
3. the promotion of sustainable settlement and viability in rural areas,
4. to ensure a just allocation of benefits stemming from aquaculture.

However, the Authority notes that in the preparatory works²³ of the current Fish Farming Regulation it is stated that the main reasoning for introducing such ownership ceilings, by Regulation No. 158/2001, was that the aquaculture industry had developed a “*structure and importance*” which indicated that there “*should be exercised closer [governmental] control [...] with changes leading to big ownership concentrations*”.

Further, it was stated that the “*circumstances behind [the introduction of the rules] was the sale of Hydro Seafood to Dutch Company Nutreco, and the debate it triggered as regard foreign control over the Norwegian Aquaculture industry, and through that, Norwegian natural resources*”.²⁴

Norway does not refer to the protection of the national industry as one of the aims of the national rules. However, according to the above, the protection of the national industry appears to be an underlying factor for the introduction of the ownership restrictions. The protection of domestic businesses constitutes a purely economic aim which cannot justify restrictions on fundamental freedoms.²⁵ Further, the Authority observes that the existence

²² See e.g. joined cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 23; Case C-54/99 *Association Eglise de Scientologie de Paris and Scientology International Reserves Trust v. the Prime Minister* [2000] ECR I-1335, paragraph 18; Case C-367/98 *Commission v. Portuguese Republic*, [2002] ECR I-4731, paragraph 49; C-483/99 *Commission v. France* [2002] ECR I-4781, paragraph 45; C-503/99 *Commission v. Belgium* [2002] ECR I-4809, paragraph 45; C-400/08 *Commission v. Spain* [2011] Not yet published, paragraph 73; C-442/02 *Caixa Bank France* [2004] ECR I-8961, paragraph 17.

²³ Draft regulation with explanatory note sent on public hearing with deadline 16 December 2005 (the document was not dated, but was published on the Ministry of Fisheries and Coastal Affairs' website 2 December 2005): “*Hearing – Regulation on changes in the regulation on control with changes in ownership in companies etc. which holds concessions to rear fish for food of salmon and rainbow trout in sea waters*” (*Høring – Forskrift om endring av forskrift om kontroll med Eiermessige endringer i selskap mv. som innehar tillatelse til oppdrett av matfisk av laks og regnbueørret i sjø*”).

²⁴ The Norwegian original text reads: “*De bakenforliggende forhold [for innføringen av forskriften] var salget av Hydro Seafoods til nederlandske Nutreco og den debatt dette skapte i forhold til kontroll med norsk havbruksnæring.*”

²⁵ Case C-164/99 *Portugalia Construções Lda* [2002] ECR I-787, paragraph 26.

of such an underlying aim calls for a more careful assessment of whether the legitimate objectives being pursued by the measure are actually attained.²⁶

5.2.2 Legitimacy of the aims pursued by the contested rules

1) *Varied industry structure and promotion of competitiveness and profitability of the aquaculture industry*

As stated above, aims based on purely economic objectives cannot justify restrictions on the fundamental freedoms.²⁷ The pursuit of a certain industry structure, *per se*, must be considered as a purely economic objective not being legitimate as to justify restrictions of the fundamental freedoms.²⁸

Those considerations also apply to what may be regarded as the competition policy based objectives of Section 3 of the Fish Farming Regulation. As a general rule competition policy based objectives cannot constitute a valid justification for restrictions to the right of establishment.²⁹ Moreover, and in any event, the Norwegian Competition Act, which is applicable to the aquaculture sector, already addresses the potential negative effects on competition entailed by ownership concentrations. Norway has not demonstrated that the aquaculture sector presents special features which would justify the necessity of the supplementary prohibition of certain mergers contained in Section 3 of the Fish Farming Regulation.

As a result of the above, neither the pursuit of a certain industry structure, nor the competition policy based objectives constitute legitimate objectives that may justify the restrictions on the freedom of establishment entailed by the national measures.

2) *Promotion of sustainable settlement and viability in rural areas*

The promotion of sustainable settlement and viability in rural areas is a regional policy objective. Regional policy objectives are legitimate objectives in the public interest which may serve to justify restrictions to the fundamental freedoms.³⁰

The aim to ensure a “*just allocation of benefits stemming from the use of common sea territory*” could also be considered as a legitimate objective, as the CJEU, in its judgment in case C-452/01 *Ospelt*, ruled that “*preserving agricultural communities, maintaining a distribution of land ownership which allows the development of viable farms and sympathetic management of green spaces and the countryside as well as encouraging a*

²⁶ See for comparison Case E-2/11 *STX Norway Offshore AS and others*, judgment of 23 January 2012, not yet published, paragraph 84.

²⁷ Cases C-96/08 *CIBA* [2010] ECR I-2911, paragraph 48; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 50; Case C-182/08 *Glaxo Wellcome* [2009] ECR I-8591, paragraph 82. Cases C-367/98 *Commission v. Portuguese Republic* [2002] ECR I-4731, paragraph 52; C-174/04 *Commission v. Italy* [2005] ECR I-4933, paragraph 37. C-400/08 *Commission v. Spain* [2011], Not yet published, paragraph 74 and 95-98. See also case E-3/05 *EFTA Surveillance Authority v. Norway* [2006] EFTA Court Report p.102, paragraph 58 cf. paragraph 57.

²⁸ Case C-400/08 *Commission v. Spain* [2011], Not yet published, paragraphs 95-98.

²⁹ Case C-174/04 *Commission v. Italy* [2005] ECR I-4933, paragraphs 36-37; Case C-422/01 *Skandia* [2003] ECR I-6817, paragraph 54-58.

³⁰ Cases E-3/05 *EFTA Surveillance Authority v. Norway* [2006] EFTA Court Report p.102, paragraph 57 cf. paragraph 58; E-1/03 *EFTA Surveillance Authority v. Iceland* [2003] EFTA Court Report p. 143, paragraph 35; C-302/97 *Konle* [1999] ECR I-3099, paragraph 40; Case C-452/01 *Ospelt*, [2003] ECR I-9743, paragraphs 38-40.

*reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives” capable of justifying restrictions.*³¹

5.3 Proportionality

The question is therefore whether Section 3 of the Fish Farming Regulation is considered proportionate to secure the attainment of the legitimate regional policy objectives, including the aim to ensure a just allocation of benefits stemming from the use of the common sea territory. This proportionality assessment will address the attainment of the legitimate objectives together, meaning that when it in the following is referred to the “*acknowledged legitimate objectives*”, it shall encompass both the regional policy objectives of viability and sustainable settlement, and the aim to ensure a just allocation of benefits stemming from the common sea territory.

5.3.1 Suitability

The State must show that measures restricting fundamental freedoms are appropriate for ensuring the attainment of the legitimate objectives relied upon.³² When assessing the suitability of restrictive national measures it is not sufficient that such measures (just) are likely to contribute to the attainment of the stated objectives.³³ The contentions made by the State “*must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and specific evidence substantiating its arguments*”.³⁴

The Norwegian Government argues that the national measures must be considered suitable as it is reasonable to assume that the measures will contribute to realize the objectives in a short or longer term. To support this argument, the Norwegian Government refers to case law where the pursuit of public health objectives was invoked as a justification for restrictions to the fundamental freedoms.³⁵ The statements of the EFTA Court and the Court of Justice in those cases must, however, be seen in light of the special features of national measures pursuing public health objectives.

Admittedly, within the field of public health the EFTA Court and the Court of Justice appear to limit themselves to the question whether it is reasonable to assume that the measure would be able to contribute to the protection of human health. In cases of uncertainty, the EFTA Court is ready to give the States the benefit of the doubt, as “*the health and life of humans rank foremost among the assets or interests protected by Article 13 EEA*”.³⁶ In other words, because of the issues at stake, the EFTA Court and the Court of Justice accept that a measure, for which adequacy is not clearly demonstrated, is maintained at the risk of unjustifiably restricting trade, in order to avoid taking the risk of

³¹ Case C-452/01 *Ospelt* [2003] ECR I-787, paragraphs 38-40.

³² Cases C-542/09 *Commission v. Netherlands* [2012] Not yet published, paragraph 81; C-370/05 *Festersen* [2007] ECR I-1135, paragraphs 30-32.

³³ C-370/05 *Festersen* [2007] ECR I-1135, paragraphs 31-32.

³⁴ Case C-542/09 *Commission v. Netherlands* [2012] Not yet published, paragraphs 81-82, with further references to case law. See also case C-389/05 *Commission v. France*, [2008] ECR I-5337, paragraph 103.

³⁵ Case E-16/10 *Phillip Morris* [2011] Not yet published, paragraphs 83-84. Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraph 34 and the Opinion of the Advocate General, paragraph 32; C-434/04 *Ahokainen* [2006] ECR I-9171, paragraph 32, and the Opinion of the Advocate General paragraph 24. Case C-366/04 *Schwarz* [2005] ECR I-10139, paragraphs 35-36.

³⁶ Case E-16/10 *Phillip Morris*, [2011] Not yet published, paragraph 77.

affecting human health. This approach is, in the Authority's opinion, specific to situations where such risks may be at stake. The Authority does not consider this line of the case law to be applicable to the present case.

The Authority takes the view that the national measures are not suitable to realise the acknowledged legitimate objectives, as Section 3 of the Fish Farming Regulation, in itself, neither ensure that jobs within fish farming and ancillary businesses are situated throughout the administrative regions,³⁷ nor the creation of further added values locally. As such, there is no direct link between Section 3 of the Fish Farming Regulation and, e.g. the use of locally recruited employees, local slaughtering facilities, local head offices, local suppliers or an industry structure with a certain amount of smaller players.

The Norwegian Government has only based its observations on an unsubstantiated assumption that the national measures will result in a favourable combination of small, medium-sized and bigger concession holders.

Norway has not substantiated that Section 3 of the Fish Farming Regulation contributes to the achievement of the acknowledged legitimate objectives. The documentation provided by Norway – a presentation by researchers on value creation in coastal areas³⁸ and an overview of where the bigger concession holders have their main offices³⁹ - does not demonstrate a link between the measures of Section 3 of the Fish Farming Regulation and the pursuit of the acknowledged legitimate objectives. Indeed, contrary to the alleged objective of the national measures, the consistent structural trend during the years of ownership ceiling regulations (since 2001) has been consolidation in the industry – a development towards fewer and bigger market players.⁴⁰

Concessions may be operated together through the cooperation between different concession holders (different companies or different groups of companies), cf. e.g. Regulation No. 822/2008 Section 49⁴¹ and information available at the Food and Agriculture Organisation of the United Nations (FAO).⁴² Cooperation between different companies may include the use of common farm sites, slaughtering facilities and research and development (R & D). Thus, independently of the industry's ownership structure, as regulated by Section 3 of the Fish Farming Regulation, such economically rational behaviour from companies seems likely to keep down the number of production and slaughtering installations, R & D centres etc., contrary to the intentions behind Section 3 of the Fish Farming Regulation. As regards the pursuit of the acknowledged legitimate objectives, the opportunity for companies to cooperate on the exploitation of concessions and ancillary functions thus casts further doubts on the suitability of the contested measures.

³⁷ The spreading out throughout Norway of aquaculture industry jobs is ensured by other national measures, e.g. Section 33 of Norwegian Regulation No. 1798/2004 ("laksetildelingsforskriften"), which requires that a concession shall be exploited in the region it is attached to.

³⁸ A presentation by the two researchers John R. Isaksen (NOFIMA Market) and Eirik Mikkelsen (NORUT): "Does value creation matter in municipal coastal zone planning in Norway" [2010].

³⁹ Enclosure to letter from the Norwegian Ministry of Transport and Communications to the Authority dated 16 March 2012.

⁴⁰ Presentation paper handed over by the Norwegian Government 12 October 2011 on the meeting between the Minister of Fisheries and Coastal Affairs and the Authority (Event No. 611421).

⁴¹ The limitation in Section 49(1) of Regulation No. 822/2008, the prohibition against both "*samdrift*" and "*samløkalisering*" at the same site is noted, cf. the definitions of the mentioned terms in Section 4 t) and u) of the same regulation.

⁴² National Aquaculture Sector Overview. Norway. National Aquaculture Sector Overview Fact Sheets. Text by Venvik, T. In: *FAO Fisheries and Aquaculture Department* [online]. Rome. Updated 1 May 2005. Published on the FAO website http://www.fao.org/fishery/countrysector/naso_norway/en

Furthermore, the Norwegian scheme for aquaculture of other fish species than salmon and trout does not contain similar ownership restrictions.⁴³ Regardless of the different financial conditions between salmon and trout farming and these rather new and less established industries, *e.g.* cod farming, this inconsistency in the national legislation does, similarly, cast doubts on the suitability of the ownership restrictions.⁴⁴

Finally, as stated above, the pursuit of a certain industry structure is not a policy objective which in itself can justify restrictions to the fundamental freedoms. Even assuming that this objective was legitimate, the Norwegian Government has not provided convincing arguments and documentation showing that the ownership restriction would be suitable to attain it.

5.3.2 Necessity

The Authority is also of the opinion that Section 3 of the Fish Farming Regulation goes beyond what is necessary in order to achieve the pursued acknowledged legitimate objectives.

Moreover, there are other current or potential measures that appear to be more suitable and less restrictive in their pursuit of the acknowledged legitimate objectives.

The prohibition on the acquisition of concessions above the threshold of 25% of the total biomass could be replaced by a less restrictive authorisation system applicable to transactions above that threshold, provided that such an authorisation scheme fulfills the principles of proportionality and transparency, *i.e.* being based on objective, non-discriminatory criteria known in advance, sufficiently limiting national authorities' discretion in such a way that it is not used arbitrarily.⁴⁵

As regards the prior authorisation scheme applicable for acquisitions leading to control of between 15 and 25% of the concession total, it does in any case go beyond what is necessary to attain its objectives, as it does not comply with the above mentioned requirements concerning transparency and objectivity. The lack of precision contained in the criteria listed in paragraph 3 of Section 3 of the Regulation⁴⁶ – merely stating that

⁴³ Norwegian Regulation No. 1799/2004, "Forskrift om tillatelse til akvakultur av andre arter enn laks, ørret og regnbueørret".

⁴⁴ Information provided by the Norwegian Government in the meeting of 12 October 2011 between the Norwegian Minister for Fisheries and Coastal Affairs and the Authority.

⁴⁵ Case C-390/99 *Canal Satélite Digital v Administración General Del Estado* [2002] ECR I-607, paragraph 35 and case-law cited therein. This obligation of transparency also stems from the principle of legal certainty. The Court of Justice has consistently ruled that individuals should have the benefit of a clear and precise legal situation enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts, cf. Case 29/84 *Commission v Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission v Italy* [1987] ECR 1733, paragraph 7; Case C-59/89 *Commission v Germany* [1991] ECR I-2607, paragraph 18; Case C-236/95 *Commission v Greece* [1996] ECR I-4459, paragraph 13; Case C 483/99 *Commission v France* [2002] ECR I-4781, paragraph 50, Case C-54/99 *Association Église de Scientologie de Paris* [2000] ECR I-1335, paragraph 22, Case C-478/01 *Commission v Luxembourg* [2003] I-2351, paragraph 20, Case C 463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 74-75, and Case C-370/05 *Festersen*, [2007] ECR I-1129, paragraph 43.

⁴⁶ Paragraph 3 of Section 3 of the Fish Farming Regulation: "In the assessment of whether to grant permission to an acquisition the Department shall emphasize whether the acquisition contributes to achieving the national objectives for the industry, including the increase in the value of Norwegian export of fish, the increase in value creation, and to achieving the potential of the industry as a whole. In addition, if the acquisition contributes to maintaining the industry as a profitable and vigorous coastal industry.

emphasis shall, *inter alia*, be put on whether the applicant contributes in the achievement of value creation and the national objectives of the aquaculture industry - does make it difficult for applicants to appraise the extent of their rights and obligations and leaves considerable discretionary powers to the competent authorities.⁴⁷ Moreover, the Authority notes that the criteria, *prima facie*, do not appear to relate primarily, let alone exclusively, to the acknowledged legitimate objectives.

In view of the above the Authority must reach the conclusion that the facts that Norway has a wide discretion with regard to the authorisation procedure, and that there is a total ban on the acquisitions of concessions above the 25% threshold, go beyond what can be considered as necessary to attain the objectives relied on by Norway.

6. Conclusion


Accordingly, as its information presently stands, the Authority must conclude that by maintaining in force Section 3 of the Fish Farming Regulation, which requires a prior authorisation to be obtained when a market player gains control of more than 15 % of the total concession biomass, and prohibits market players from controlling more than 25 % of the available concessions, Norway has failed to fulfil its obligations arising from Article 31 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority invites the Norwegian Government to submit its observations on the content of this letter of formal notice within two months following receipt thereof.

After the time limit has expired, the Authority will consider, in light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

Yours faithfully,



Sabine Monauni-Tömördy
College Member

⁴⁷ C-452/01 *Ospelt* [2003] ECR I-9743, paragraph 34; Case C-367/98 *Commission v. Portugal* [2002] ECR I-4731, paragraph 50; Case C-483/99 *Commission v. France* [2002] ECR I-4781, paragraph 52; Case C-463/00 *Commission v. Spain* [2003] ECR I-4581, paragraph 69 and paragraphs 56-61; Case C-370/05 *Festersen* [2007] ECR I-1135, paragraph 43.