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Brussels, 14 February 2012
Case No: 68781
Event No: 623717

EFTA SURVEILLANCE
AUTHORITY

Ministry of Fisheries and Coastal Affairs
Grubbegata 1
N-0032 Oslo
Norway

Dear Sirs,

Subject: Ownership restrictions in the Norwegian fish farming industry

1 Introduction

On 20 September 2010, the EFTA Surveillance Authority (“the Authority”) received a complaint against Norway concerning ownership restrictions in the Norwegian fish farming industry.

The complainant submits that the ownership restrictions in the fish farming industry, as introduced into Norwegian law by Regulation of 22 December 2004 No. 1800 (*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”), constitute a violation of the freedom of establishment and the free movement of capital as provided for in Articles 31 and 40 EEA.

According to the complainant, any increase in ownership of the production capacity in terms of biomass, 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 complainant states that the acquisition of more than 25% of the total production capacity is prohibited under the Fish Farming Regulation.

By this letter the Authority’s Internal Market Affairs Directorate (the Directorate) sets out its preliminary conclusions in this case.

2 Correspondence

In a letter of 27 September 2010, the Authority requested certain information from Norway concerning the historical development of the Norwegian rules on ownership restrictions in the fish farming industry. Furthermore, the Authority asked Norway to explain whether it considered the rules to be in conformity with Articles 31 and 40 EEA (Event No. 570954).

The Norwegian Government replied by a letter of 29 October 2010. As a response to the letter from the Norwegian Government, the complainant submitted a memorandum to the Authority, dated 22 November 2010.

The case was discussed at the package meeting held in Norway on 11-12 November 2010. In a follow-up letter to that meeting, dated 25 November 2010, the Authority asked Norway, *inter alia*, to clarify whether it considers the subject-matter of the complaint to fall within the scope of the EEA Agreement (Event No. 579485). The Norwegian Government provided the requested information in a letter of 23 December 2010.

The complainant submitted further observations on Norway's letter of 23 December 2010 in a letter of 14 January 2011. By letter dated 4 July 2011 the complainant submitted some additional observations (Event No. 603432).

On 11 March 2011, the Authority had a meeting with representatives from the Norwegian Government, where they elaborated on the content of the Norwegian scheme. The Norwegian Government also provided their understanding on the relationship between the relevant Norwegian rules and EEA law. On 24 May 2011, a further meeting was held between the Norwegian Government and the Authority. In the meeting, the Norwegian Government further outlined its understanding of how the relevant national rules should be understood in light of EEA law.

On 12 October 2011 a meeting was held between the Authority and the Norwegian Minister of Fisheries and Coastal Affairs, Ms. Lisbeth Berg-Hansen. In the meeting the minister reiterated and elaborated on the information and arguments already submitted by the Norwegian Government in earlier correspondence and meetings. In support of their oral submissions, the Norwegian delegation also handed out a presentation paper (Event No. 611421).

The case was discussed with the Norwegian Government at the package meeting held in Oslo 10 and 11 November 2011.

3 Relevant national law

Introductory remarks

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 two layers of necessary permissions are outlined in the following:

3.1 The Aquaculture concession

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 land and sea territory planning

issues. Section 14 of Regulation No. 1798/2004 specifies that the competent ministry decides when concessions are announced and granted, and the geographical distribution of new concessions. The Ministry also sets a price to be paid for the grant of each concession, cf. Section 16 of Regulation No. 1798/2004. It follows from Sections 4 and 19 of the Aquaculture Act that an aquaculture concession may also be acquired through purchasing it from a holder. When concessions are transferred between private actors in the open market no price restrictions apply, a market price may be charged. A concession is linked to a specified administrative region, cf. e.g. Section 33 of Regulation No. 1798/2004. Section 5(1) of the Act also specifies that the concession must be utilised in accordance with the currently applicable limitations, for example the rules limiting the maximum allowed amount of biomass per concession, as addressed below.

Section 7 of the Act empowers the competent ministry to further regulate the grant of concessions for production of salmon, trout and rainbow trout.

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 tons (945 tons if all production under the concession takes place in the counties of Troms and Finnmark, cf. section 15 of Regulation No. 1798/2004 and Section 2 of Regulation No. 266/2011).

Accordingly, when new concessions are issued by the Ministry of Fisheries and Coastal Affairs, the overall national amount of permitted biomass (potential production capacity) increases.

3.2 The site clearance

In addition to the aquaculture concession, a specific authorisation, a special “*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. The same goes if the size of the site is changed. These provisions are laid down in Section 29 of Regulation No. 1798/2004. Section 30 states that a site may be cleared if it is environmentally sound and if it, *inter alia*, complies with planning objectives, nature protection interests, and requirements derived from other legislation. Maximum 4 sites may be used for the utilisation of one aquaculture concession, cf. Section 34 of Regulation No. 1798/2004.

3.3 The ownership ceilings

Regulation No. 1800/2004 applies to concessions for production in sea water of salmon and trout (including rainbow trout) intended for human food consumption (cf. section 2). Section 1 states that the objective of the Regulation is to “*ensure control with changes in ownership of companies which holds concessions to rear salmon, trout and rainbow trout, in order to achieve the national goals of the aquaculture industry*”.

The headline of Section 3 of Regulation No. 1800/2004 is “*National ownership limitation*” and reads¹:

“A permission from the Ministry of Fisheries and Coastal Affairs is required if an acquisition leads to a situation where the buyer gains control over 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 ownership interests, or that similar control is achieved by other means.

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

In the assessment of whether to grant permission to an acquisition the Ministry 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, 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.

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.”

(Non-official translation)

When the ownership ceilings scheme was introduced in 2001 the thresholds were 10, 15 and 20 %, respectively. The latter implied an absolute limit, while overstepping the two lowest limits required an authorisation. In 2004 the Government introduced a new regulation with two ceilings of 20 and 35 %, the latter representing an absolute ceiling. In 2005, a new Government reduced the threshold to its current level.

¹ The authentic Norwegian version reads:

Headline: “*Nasjonal eierbegrensning*”

Text of the provision: “*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.”

Furthermore, Section 5 of Regulation No. 1800/2004 provides a regional ownership limitation, by stating that no concession holder can control more than 50 % of the total concession biomass in a region (the regions are defined by the competent authorities).

It is 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, which is the subject of the complaint and this letter.

4 Relevant 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.”

Article 40 EEA provides that:

“Within the framework of the provisions of the Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.”

Article 1 of the Act referred to at point 1 of Annex XII to the EEA Agreement (*Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty* (“the Capital Movements Directive”)), as adapted by Protocol 1 thereof, which implements Article 40 of the EEA Agreement, requires the EEA States to abolish restrictions on movements of capital taking place between persons resident in the EEA States. Article 1(1) of Directive 88/361/EEC refers to a non-exhaustive Nomenclature in Annex I to the Directive, in which capital movements operations are classified, specifying, *inter alia*, that capital movements comprises direct investments.

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 (right of establishment) 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 (capital movements) 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”.

5 The Directorate’s assessment

Introductory remarks

Unless otherwise specified the Authority’s assessment concerns all paragraphs 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”.

5.1 Applicability of the EEA rules on freedom of establishment and free movement of capital

5.1.1 Establishment or capital

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 Justice², the question of whether the national legislation falls 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.³ Acquisition of shares below this threshold by a non-resident constitutes a capital movement within the meaning of Article 40 EEA.

² C-524/04 *Test claimants* [2007] ECR I-2107, paragraph 27; C-112/05 *Commission v. Italy* [2009] ECR I-2291, paragraph 34.

³ 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.

Section 3, paragraph 1 of the Fish Farming Regulation only applies to acquisitions which gives the acquirer “control” of more than 15 % of the total concession biomass. The term “[C]ontrol” is defined as “direct or indirect ownership to more than half of the ownership interests, or that equivalent control is achieved by other means”.

It thus appears as Section 3 of the Fish Farming Regulation is meant to apply to investments which give either direct or indirect ownership to more than half of the shares or *definitive influence* over a company’s decisions and opportunity to *determine* its activities. Investments which do not give the investor such level of ownership or influence will not fall under the scope of Section 3 of the Fish Farming Regulation.

However, the Directorate cannot totally exclude that certain acquisition of shareholding above 50 % of the share capital could fall under the free movement of capital rules of the EEA Agreement. Acquisitions of more than half of the shares in a company normally give the owners definite influence on the company’s decisions and allow them to determine its activities. Such acquisition therefore normally concerns the freedom of establishment. However, depending in particular on the ownership structure, it cannot be excluded that the acquisition of a shareholding exceeding 50 % of the share capital does not give definite influence on the decisions of the company or allow determining its activities. By way of its size, the acquisition nonetheless falls under Section 3 of the Fish Farming Regulation. Accordingly, as its knowledge presently stands, the Directorate considers that the national rules fall to be assessed under both Article 31 and Article 40 EEA.

5.1.2 Sectoral adaptations

First, it must be assessed whether the special provisions of the EEA Agreement - excluding certain restrictions on the freedom of establishment and free movement of capital in the fishery sector from the scope of Articles 31 and 40 EEA - are applicable to acquirers of holdings in aquaculture companies, cf. Annexes VIII point 10 and XII point 1(h) (see chapter 4 of this letter). These provisions permit Norway to uphold discriminatory and restrictive rules in relation to fishing operations and fishing vessels (freedom of establishment) or solely fishing vessels (free movement of capital). As there are derogations from the main rule that these freedoms are applicable to all sectors in the EFTA States, they should accordingly be construed narrowly⁴.

Concerning the adaptation in Annex XII, it can, already based on the wording, be concluded that the term “fishing vessels” cannot cover aquaculture. As regards, Annex VIII (establishment), point 10 allows restrictions on establishment of, on the one hand, “non-nationals in fishing operations”, and, on the one hand, of “companies owning or operating fishing vessels”.

The wording used and the structure of the sentence points to the fact that these are not two distinct groups practicing distinct economic activities. The Contracting Parties had the intention to cover modalities of carrying a same activity: catching live fish in the sea,

⁴ 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 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.

either as an individual fisherman, or through a corporate structure owning or operating fishing boats.⁵

Analysis of the wording leads to the same conclusion. The decisive point of interpretation is whether the term “fishing operations” covers aquaculture. 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 reared, produced, at the fish farm up until slaughtering.

In the equally authentic Norwegian language version of Annex VIII the term “fiske” is used. According to dictionaries⁶ this term normally mean the operations and methods of catching fish or other water based egg-laying animal for food or for sports, for industrial or leisure purposes.

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.

Furthermore, it may be useful to make a comparison with Annexes VIII point 9 and XII 1(g), containing related adaptations for Iceland. The wording of these adaptations 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.⁷ A more narrow understanding of the Norwegian adaptations is also suggested by the history and the purpose of the two provisions at issue, as recapitulated in the preparatory works for the Norwegian ratification of the EEA Agreement:⁸ It was considered to be in Norway’s interest to maintain restrictions on investments from non-nationals into fishing operations or companies owning or operating fishing vessels. Yet, it was specified that Norway was interested in foreign investments in e.g. land based sea food industry, cf. the second paragraph of Annex XII point 1(h), which specifies that “*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.*”⁹

In light of the above, the Directorate is of the opinion that Annex VIII point 10 and Annex XII point 1(h) does not exempt aquaculture in Norway from the provisions of Articles 31 and 40 of the EEA Agreement. This is in line with the Authority’s previous position¹⁰ and the Norwegian Government has not presented any arguments, which in the Directorate’s view could call for a reassessment thereof.

⁵ This is particularly apparent in the German version, which refers to „Personen fremder Staatsangehörigkeit, die im Fischereiwesen tätig sind“ and to „Unternehmen, die Eigentümer oder Betreiber von Fischereifahrzeugen sind, weiterhin anwenden“ and the Italian version, which refers to „cittadini stranieri nel contesto di attività legate alla pesca“ and to “società che possiedono o armano navi da pesca”. Other linguistic versions point to the same direction (Norwegian: “utenlandske statsborgere innen fiske”/”selskaper som eier eller driver fiskefartøyer”; French: “ressortissants étrangers pratiquant la pêche”/”sociétés possédant ou exploitant des navires de pêche”).

⁶ *The Oxford Encyclopedic English Dictionary*, Oxford University Press 1991, p. 531; *Bokmålsordboka (web based)*, University of Oslo and the Norwegian language council (“Språkrådet”).

⁷ Although the Icelandic adaptations appears 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.

⁸ St. prp. Nr. 100 (1991-92) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS), undertegnet i Oporto 2. mai 1992, in particular paragraphs 4.6.4 (p. 135) and 4.6.5 (p.138).

⁹ In the equally authentic Norwegian version this quote reads: ”[r]estriksjonene skal ikke være til hinder for at utenlandske statsborgere investerer i landbasert fiskeforedling eller i selskaper som bare er indirekte engasjert i fiske.”

¹⁰ This conclusion is fully in line with the Authority’s Decision 337/01/COL of 15 November 2001.

This assessment is not altered by the fact that the Authority, in its decision of 30 October 1996 (“Scottish Salmon Grower Association”) held that aid granted to the aquaculture industry was outside the scope of the Authority’s competences in the field of state aid¹¹. The Directorate 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.

5.2 Restriction on the right to establishment and free movement of capital

Settled case law provides that the freedom of establishment and free movement of capital encompass a general prohibition on restrictions¹². It has been repeatedly held that national measures which impede or render less attractive the exercise of these freedoms are to be considered as restrictions to the freedom of establishment and the free movement of capital¹³.

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 can therefore be seen as to constitute a two-fold restriction: In addition to the restrictive effects of the ban on controlling more than 25 % of the total concession biomass, the requirement of a prior authorisation for the acquisition of holdings implying control of more than 15 % of the concession total, does in itself constitute a restriction.¹⁴

The national measures may therefore have a deterrent effect on players considering to invest or establish themselves in the salmon or trout farming business in Norway¹⁵. Hence, the national measures constitute restrictions on the right of establishment and free movement of capital as provided by Articles 31 and 40 EEA.

5.3 Relationship to free movement of goods rules

Referring to the judgment of the EFTA Court in the *Pedicel* and also to cases C-148/85 *Forest* and C-15/79 *Groenveld*¹⁶, the Norwegian Government primarily argues¹⁷ that the

¹¹ Decision Nos. 195/96/COL and 176/05/COL.

¹² 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.

¹³ 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] I-2835; C-326/07 *Commission v. Italy* [2009] Not yet published, paragraph 56-57.

¹⁴ 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] I-2157, paragraph 33; C-400/08 *Commission v. Spain* [2011] Not yet published, paragraph 65; C-570/07 *Blanco Pérez and Chao Gómez* [2010] Not yet published, paragraph 53 and 54.

¹⁵ C-452/01 *Ospelt* [2003] ECR I-9743, paragraph 34; C-367/98 *Commission v. Portugese Republic* [2002] ECR I-4731, paragraph 50 ; C-483/99 *Commission v. France* [2002] ECR I-4781, paragraph 52 ; C-463/00 *Commission v. Spain* [2003] ECR I-4581, paragraph 69 and paragraphs 56-61.

¹⁶ Cases E-4/04 *Pedicel* [2005] EFTA Court Report p. 15; C-148/85 *Forest* [1986] ECR I-3449; C-15/79 *Groenveld* [1979] ECR I-3409.

national measures concern the free movement of goods only (as a potential restriction on the export of fish), and that the national measures provided by Section 3 of the Fish Farming Regulation, consequently, fall 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).¹⁸

Section 3 of the Fish Farming Regulation regulates the distribution and allocation of allowed production capacity in the sense that it limits the total biomass (fish) a market player is allowed to “control”. Section 15 of Norwegian Regulation No. 1798/2004 limits the maximum biomass per concession to 780 tons (945 tons if all production under the concessions takes place in the counties of Troms and Finnmark, see above under chapter 3). Section 4, litra c) of the Norwegian Regulation No. 1798/2004 defines “biomass” as “the currently existing quantity of live fish (measured in kilograms or tons)”. Thus, the overall nationwide biomass level (production level) is regulated independently of the ownership ceilings.

More importantly, it may well be that a particular national measure comes within the scope of more than one of the fundamental freedoms.¹⁹ The applicability of the rules on free movement of goods on national measures does therefore not preclude the applicability of the rules on establishment and capital movements. In other words, the fact that a measure might constitute a restriction on the free movement of goods does not preclude that it might also be restrictive to the right of establishment. The application of the other freedoms (than goods) is only precluded if the impact on those is only an “*indirect*”²⁰ consequence of the influence on the free movement of goods. That is not the situation in the present case. It is therefore not necessary for the Directorate to examine whether the free movement of goods rules of the EEA Agreement had been applicable if salmon and trout fell under the product scope of the EEA Agreement.

As regards the reference to the *Pedical* case, it suffices to point out that, contrary to the situation in that case, there are specific provisions in 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. This confirms that the rules of the EEA Agreement on right to establishment and free movement of capital,²¹ are, if not covered by the special adaptations, fully applicable to establishment and investments in the fishery sector, regardless of whether the rules on the free movement of goods in the EEA Agreement are made applicable to a product produced or traded by the natural or legal person establishing or being invested in, cf. Article 8(3) EEA.

¹⁷ Line of argumentation presented to the Authority by the Norwegian Government in meetings held 11 March and 24 May 2011.

¹⁸ Neither do Article 20 EEA and Protocol 9 have any implications upon this case, cf. arguments contrary to this indicated by Norway in the letters dated 29 October (see point 4) and 23 December (see point 1) 2011.

¹⁹ See e.g. cases C-255/97 *Pfeiffer* [1999] ECR I-2835, paragraphs 24-25; C-108/96 *Grandvision* [2001] ECR I-837, paragraphs 19-21; C-418/93 *Semeraro* [1996] ECR I-2975, paragraphs 29-32;

²⁰ Cases C-255/97 *Pfeiffer*, cited above, paragraphs 24-25; C-108/96 *Grandvision*, cited above, paragraphs 19-21; C-418/93

²¹ The rules on right to establishment and free movement of capital are in Part III of the EEA Agreement. Special adaptations as regard the EFTA States and secondary legislation concerning these fields are in Annexes VIII and XII to the EEA Agreement.

5.4 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

5.4.1 The justifications invoked

In the letter to the Authority dated 23 December 2010, the Norwegian Government submitted the following justifications:

The Norwegian Government's aquaculture policy seeks to achieve a varied industry structure, with both large and small industrial players, in order to ensure that aquaculture concessions are not accumulated by a few large operators and to ensure a reasonable balance between the operators. This distribution of ownership is thus an important aim of the regulation, [...]

The Norwegian Government considers it unjust if one industry player was to be allowed to control a significant part of these limited sea resources - which ultimately belong to the public [...]. The just distribution of limited rights has, both historically and politically, been vital within the fisheries sector. [...] A[n] ...] aim is to ensure that the industry's utilisation of the licensee's exclusive rights is pursued in a sustainable manner for the benefit of local communities, and that the coastal districts gain something in return for the use of public sea areas r. [...] The ownership regulation [...] should also be assessed in the context of competition considerations.

In its letter dated 29 October 2010, under reference to the Authority's Decision No. 337/01/COL of 15 November 2001 (SEA063.400.001), the Norwegian Government also claims that "[e]conomic integration in coastal districts, where the aquaculture industry for the most part is located, has previously been accepted by ESA as a legitimate public interest in connection with aquaculture". The Norwegian Government also highlights that "Norwegian salmon farming takes place in coastal municipalities where the Government has special framework conditions regarding state aid in assisted areas".

5.4.2 Legitimacy of the aims pursued by the contested rules

At the outset, the Directorate notes that in the preparatory works²³ of the current Fish Farming Regulation, it is stated that the main reasoning for introducing such ownership

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*)

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*”.

Measures forming a restriction on the fundamental freedoms cannot be justified by the protection of domestic businesses, which constitutes a purely economic aim²⁴. Moreover, the Directorate observes that the existence of such aims calls for a more careful assessment of whether the legitimate objectives being pursued by the measure are actually attained.²⁵

1) *Aims of a purely economic character, i.e. the promotion of competitiveness and profitability of the aquaculture industry*

It is settled case law that aims based on purely economical objectives cannot justify restrictions on the fundamental freedoms²⁶. The pursuit of a certain industry structure per se must be considered as purely economic objectives not being legitimate as to justify restrictions from the fundamental freedoms.²⁷

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 to establishment and free movement of capital²⁸. 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 justify the restrictions on free movement of capital and freedom of establishment entailed by the national measures.

²⁴ Case C-164/99 *Portugaia Construções Lda* [2002] ECR I-787, paragraph 26.

²⁵ See for comparison Case E-2/11 *STX Norway Offshore AS and others*, judgment of 23 January 2012, not yet reported, paragraph 84.

²⁶ Cases C-96/08 *CIBA* [2010] Not yet published, 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.

²⁷ Case C-400/08 *Commission v. Spain* [2011], Not yet published, paragraphs 95-98.

²⁸ 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.

2) *To promote sustainable settlement and viability in rural areas*

The case law of the CJEU and the EFTA Court acknowledges that regional policy objectives are legitimate objectives in the public interest which may serve to justify restrictions to the fundamental freedoms.²⁹

Furthermore in its judgment in case C-452/01 *Ospelt*, the CJEU 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 reasonable use of the available land by resisting pressure on land, and preventing natural disasters are social objectives*” which are such as to justify restrictions³⁰. Therefore, the aim to ensure a “*just allocation of benefits stemming from the use of common sea territory*” could be considered as legitimate.

5.5 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 distribution of benefits from the use of common sea territory.

5.5.1 Suitability

In itself Section 3 of the Fish Farming Regulation does neither ensure the existence of jobs situated in the particular concession-region³¹ nor the creation of further added values locally, e.g. by the use of local suppliers, local slaughterhouses and locally recruited employees or an industry structure with a certain amount of smaller players.

In *Festersen*, the CJEU found that it was not sufficient that the measure in question was “*likely to contribute*”³² - and stated: “[*s*]uch a measure thus does not appear, in itself, to ensure the attainment of the alleged objective seeking to preserve the traditional form of farming by owner-occupiers.” Moreover, the Court added: “[*i*]n such a situation, the residence requirement does not guarantee the attainment of that objective, and thus it does not appear that that requirement is, in actual fact, appropriate, in itself, for the purpose of attaining such an objective.”

Furthermore, in case C-389/05 *Commission v. France*, France invoked a town and country planning objective as a justification for national rules restricting access to the market for artificial insemination of bovine animals, submitting that the restrictive measure has enabled France to conserve agricultural activity in the greater part of the French territory, most of which consists of sparsely populated areas with livestock or mountainous areas.³³ The CJEU dismissed the submission, stating that the French “*contentions are not*

²⁹ Cases E-3/05 *EFTA Surveillance Authority v. Norway* [2006] EFTA Court Report p.102, paragraph 57; C-302/97 *Konle* [1999] ECR I-3099, paragraph 40; Case C-452/01 *Ospelt*, [2003] ECR I-9743, paragraphs 38-40, E-6/98 *Norway v. EFTA Surveillance Authority* [1999] EFTA Court Report 74.

³⁰ Case C-452/01 *Ospelt* [2003] ECR I-787, paragraphs 38-40.

³¹ Jobs connected with each fish farm site are spread out over the country, this is indirectly ensured by the requirement to only utilise a concession in the region it is attached to. However, this condition follows from Section 33 of Norwegian Regulation No. 1798/2004 on the grant of concessions to rear salmon and trout (“*laksetildelingsforskriften*”), not the Fish Farming Regulation.

³² Case C-370/05 *Festersen* [2007] I-1135, paragraphs 30-32.

³³ Case C-389/05 *Commission v. France* [2008] ECR I-5337, paragraphs 101-106.

substantiated by any statistical information or data”, and it “has not fully been established” that the restrictive measures “were necessary to ensure that the insemination service was offered throughout French territory.”³⁴

The Norwegian authorities seem to assume that the national measures will result in a favourable mix between small, medium-sized and bigger concession holders. It is also assumed that smaller players, to a greater degree, are locally owned or use local actors - be it suppliers, transporters, slaughterhouses or workers – and by that create added values locally to the benefit of the coastal communities which has made available the sea territory, and stimulates sustainable settlement and viable rural coast areas.

Firstly, this assumption has so far not been documented beyond addressing in a general manner aquaculture and value creation for the municipalities, not demonstrating a link between the measures of Section 3 of the Fish Farming Regulation and the pursuit of the relevant legitimate objectives (to promote sustainable settlement and viability in rural areas and to ensure a just allocation of benefits stemming from the use of the common sea territory).³⁵ Admittedly, the Fish Farming Regulation may hinder or preclude the formation of market players overstepping the ownership ceilings. Nevertheless, it seems, at best, uncertain how it further contributes to the promotion of the legitimate objectives. Contrary to what is the alleged objective of the national measure, the consistent structural trend during the years of ownership ceiling regulations (since 2001), has been consolidation in the industry – developing towards fewer and bigger market players.³⁶

Secondly, even assuming that Section 3 of the Fish Farming Regulation is suitable to attain a certain industry structure, this would not mean that it is suitable to attain the two objectives which has been acknowledged above as legitimate, i.e. the regional policy objectives and the aim to secure a just allocation of benefits stemming from the use of common sea territory. As already mentioned, the pursuit of a certain industry structure is not a policy objective which in itself can justify restrictions to the fundamental freedoms.³⁷

5.5.2 *Less restrictive measures*

Moreover, even assuming that Section 3 of the Fish Farming Regulation is suitable to achieve a legitimate aim, there are other current or potential measures that appear to be more suitable and less restrictive in their pursuit of the relevant legitimate objectives.

In particular, 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.

Such an authorisation scheme, which would have to be based on objective, transparent and non-discriminatory criteria, in compliance with the case-law referred to below, would allow Norway to examine sales of concessions on the secondary market and prevent the sale if significant adverse effects on regional development or other relevant legitimate

³⁴ Case C-389/05 *Commission v. France*, cited above, paragraph 103.

³⁵ 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].

³⁶ 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).

³⁷ Case C-400/08 *Commission v. Spain* [2011], Not yet published, paragraphs 95-98. See also similar argument made above, under the assessment of what the Authority consider being purely economical objectives pursued by Section 3 of the Fish Farming Regulation.

objectives are present. One way of ensuring that might be to attach specific conditions to the decision authorising the acquisition.

This would allow Norway to maintain flexibility on the secondary market for concessions below the thresholds, enable its objectives to be attained under the same conditions, while avoiding unnecessary restrictions to freedom of establishment and free movement of capital.

5.5.3 Current authorisation scheme

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. Indeed, according to consistent case-law, for authorisation schemes to be proportionate, they must be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities discretion, so that it is not used arbitrarily.³⁸ 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.³⁹

Section 3 of the Fish Farming Regulation does not meet the requirements set out above in respect of transparency and objectivity. Such a lack of precision does not enable individuals to appraise the extent of their rights and obligations and leaves considerable discretionary powers to the competent authorities.⁴⁰ Moreover, the Directorate notes that the criteria listed in paragraph 3 of Section 3 of the Regulation do *prima facie* not appear primarily to relate to the regional objectives advanced by the Norwegian Government in this case.

In view of the information provided by Norway, the Directorate must reach the conclusion that the Norwegian authorities have with regard to this authorisation procedure a broad discretion and therefore that the rules concerned seem to go beyond what is necessary to attain the objectives relied on by Norway.

Summing up, the Directorate therefore concludes at this stage, that the Norwegian Government has not been able to demonstrate that Section 3 of the Fish Farming Regulation is compatible with the principle of proportionality.

³⁸ Case C-390/99 *Canal Satélite Digital v Administración General Del Estado* [2002] ECR I-607, paragraph 35 and case-law cited therein

³⁹ 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.)

⁴⁰ Case 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.

6. Conclusion

Accordingly, as its information presently stands, it is the preliminary conclusion of the Directorate 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 Articles 31 and 40 of the EEA Agreement.

The Directorate invites the Norwegian Government to provide its observations on the content of this letter by *16 March 2012*.

After the time limit has expired, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings 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,



Ólafur Johannes Einarsson

Director

Internal Market Affairs Directorate