Brussels, 16 December 2009
Case No: 65155
Event No: 538081
Dec. No: 545/09/COL

EFTA SURVEILLANCE AUTHORITY

Ministry of Petroleum and Energy
Einar Gerhardsens plass 1
0033 Oslo
Norway

Dear Sirs,

Subject: **Letter of formal notice to Norway for failure to comply with Articles 31 and 36 of the EEA Agreement and Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons**

I Introduction

The EFTA Surveillance Authority has carried out a conformity assessment of the Norwegian national measures implementing the Act referred to at point 12 of Annex IV to the EEA Agreement (*Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons*), as adapted to the EEA Agreement by Protocol 1 thereto (hereafter "the Directive").

On 17 September 2008, at the request of the Authority, Norway provided information on the implementation of the Directive, along with the national implementing measures (Event no 491821), on the basis of which the Authority undertook the conformity assessment.

On 17 July 2009, after exchanges of correspondence and informal dialogue, the Authority provided Norway with a thorough analysis of its preliminary findings and informed Norway that, on the basis of the information available to it, it appears questionable that the requirements of Section 10-2 of the Petroleum Act comply with Article 6 of the Directive and Articles 31 and 36 of the EEA Agreement. The Authority invited Norway to submit comments and observations on the preliminary findings (Event no 521111).

Norway provided the Authority with its comments on the Authority's findings by letter of 28 September 2009 (Event no 531810), and these comments were then further discussed during the package meeting in Oslo on 12 November 2009.

II Relevant national provisions

According to the Act no 72 of 29 November 1996 relating to petroleum activities[1] (hereafter "the Petroleum Act") and the Regulations under the Act relating to petroleum activities[2], laid down by Royal Decree of 27 June 1997 (hereafter "the Petroleum Regulations"), the right to conduct petroleum activities on the Norwegian continental shelf is subject to a licence from the Norwegian State, which is granted following a tendering procedure.

Amongst other requirements, the Petroleum Act requires, in the first paragraph of Section 10-2 of the Petroleum Act, that:

> *"the licensee shall, unless otherwise decided by the Ministry, have an organisation which is capable of managing independently the petroleum activities from Norway. To achieve this, the Ministry may stipulate specific requirements in respect of the organisation and the capital of the company*[3]*."*

This provision applies both to operators, which execute the day to day management of the petroleum activities, and to licensees, which are equivalent to shareholders in the operations and oversee the work of the operator.

Moreover, according to the third paragraph of Section 10-2 of the Petroleum Act:

> *"The petroleum activities shall be conducted from a base in Norway. The licensee may be ordered to use bases designated by the Ministry*[4]*."*

According to Section 1-6(c) of the Petroleum Act, petroleum activities are defined as:

> *"all activities associated with subsea petroleum deposits, including exploration, exploration drilling, production, transportation, utilisation and decommissioning, including planning of such activities, but not including, however, transport of petroleum in bulk by ship"*[5].

The notion of a "base" is not defined by Norwegian legislation. However, Norway has indicated that this refers to the base on land from where the various support ships and helicopters depart in order to conduct petroleum activities off-shore (*e.g.* from where the workers working on the platforms board the helicopters, and also from where the stand-by ships, supply ships, crane ships, pipeline-laying ships, etc. leave port to carry out their tasks)[6].

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[1] Lov om petroleumsvirksomhet, 29/11/1996 No 72, Avd I 1996 Nr 22.

[2] Forskrift til lov om petroleumsvirksomhet.

[3] *"Rettighetshaver skal, med mindre departementet bestemmer noe annet, ha en organisasjon som er i stand til selvstendig å lede petroleumsvirksomheten fra Norge. Departementet kan for å oppnå dette stille bestemte krav til organisasjonen og selskapskapitalen."*

[4] *"Petroleumsvirksomheten skal drives fra base i Norge. Rettighetshaver 1 kan pålegges å bruke baser utpekt av departementet."*

[5] These activities are, in turn, defined by Section 1-6(e) to (i) of the Petroleum Act.

[6] Email from the Norwegian Ministry of Petroleum and Energy of 20 April 2009

III Relevant EEA law

According to Article 31 of the EEA 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.

Article 36 of the EEA Agreement provides that there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

The conditions applicable to authorisation for the prospection, exploration and production of hydrocarbons are subject to the rules laid down in Directive 94/22/EC on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons.

According to Article 6 of the Directive, conditions and requirements concerning the exercise or termination of the hydrocarbon activities and the detailed obligations for use of a specific authorisation must be justified exclusively by the need to ensure the proper performance of the activities in the area for which an authorisation is requested; by reasons of national security, public safety, public health, security of transport, protection of the environment, protection of biological resources and of national treasures possessing artistic, historic or archaeological value, safety of installations and of workers, planned management of hydrocarbon resources (for example the rate at which hydrocarbons are depleted or the optimization of their recovery) or the need to secure tax revenues; or by the payment of a financial contribution or a contribution in hydrocarbons.

IV Assessment of the Authority

IV.1 Introduction

Petroleum activities are economic activities, falling within the chapter of the EEA Agreement dealing with the right of establishment when those activities are carried out on a stable and continuous basis from a principal or secondary establishment in Norway, and within the chapter of the EEA Agreement dealing with services when they are carried out by a national of one EEA State who moves to Norway in order to carry on that activity on a temporary basis[7].

IV.2 Existence of a restriction to the freedom of establishment

The obligation, for an undertaking which would want to obtain a licence in order to establish itself in Norway and take part in petroleum activities on the Norwegian continental shelf, to have "*en organisasjon som er i stand til selvstendig å lede petroleumsvirksomheten fra Norge*" ("*an organisation which is capable of managing independently the petroleum activities from Norway*"[8]) entails that such a company cannot manage its activities, or part of these activities, from another EEA State.

[7] See, to that effect, Case C-55/94 *Gebhard*, [1995] ECR I-4165, paragraphs 25 and 26.
[8] Translation provided by the Ministry of Petroleum and Energy.

This provision requires the licensee to organise his activities in such a way as to be able to manage them in a self-contained, self-reliant manner, from the Norwegian territory. This necessarily entails setting up a fully fledged and autonomous organisation in Norway, capable of managing those activities independently from other resources the licensee would have outside of Norway.

Section 10-2 of the Petroleum Act thus obliges undertakings which have their main establishment in another EEA State to incur additional costs as compared to Norwegian companies, which, in general, have their main offices in Norway. In particular, EEA undertakings would have to hire a dedicated staff in Norway, possibly duplicating or replacing management, experts or administrative staff they already have in another EEA State and who could manage the petroleum activities in Norway, or, at the very least, aspects of those activities. Such a rule would be liable to prohibit, impede or render less attractive the exercise of their freedom of establishment[9]. For this reason alone, Section 10-2 constitutes a restriction to the freedom of establishment, guaranteed by Article 31 of the EEA Agreement.

Furthermore, such a rule would run against the principle that companies have the right to choose the most appropriate way in which to structure their trans-European organisation. This principle is the consequence of the right, for a company, to choose the most appropriate form of establishment to carry out its activities in another EEA State[10], including a secondary establishment consisting merely of an office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency[11].

Similarly, the obligation of the third paragraph of Section 10-2, *i.e.* to use a base on the Norwegian mainland to conduct offshore activities, instead of a base on the mainland of another EEA State (for example in the United Kingdom, Denmark, Netherlands, etc.), which could afford similar accessibility to the offshore site, has a restrictive effect on the freedom of establishment of EEA undertakings. It would force those who want to prospect, explore and/or produce hydrocarbons on the Norwegian Continental Shelf to use Norwegian ports or airports, which will have direct consequences on the undertakings' organisation, giving an undue advantage to firms already established in Norway, which, presumably, already use Norwegian ports and airports to that effect.

In addition, these obligations are liable to prohibit, impede or render less attractive the exercise of the freedom of establishment of undertakings already established in Norway, which would want to transfer the management or part of the management of their activities to another EEA State, or change the base from which they operate[12].

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[9] For example, concerning the restriction to the freedom of establishment constituted by the obligation to carry on the activity of a dealer in transferable securities in a Member State in the form of a company or firm whose registered office is that Member State: Case C-101/94 *Commission v Italy (Re Restrictions on Foreign Securities Dealers)* [1996] ECR I-02691, paragraphs 13-14

[10] See, for example, Case C-307/97 *Saint Gobain ZD* [1999] ECR I-6161, Case C-101/94 *Commission v Italy (Re Restrictions on Foreign Securities Dealers)* [1996] ECR I-02691 and Case 270/83 *Commission v France (Avoir Fiscal)* [1986] ECR 273.

[11] Case 205/84 *Commission v Germany* [1986] ECR 3755, paragraph 21.

[12] See, for example, Case C-264/96 *Imperial Chemical Industries* [1998] I-4695, paragraph 21.

IV.3 Existence of a restriction to the freedom to provide services

Not all petroleum activities should necessitate a stable and continuous presence on the Norwegian continental shelf and it could be conceivable that the licensee, or one of his sub-contractor, would want to operate from a base in another EEA State.

In this context, one may note that some fields located in the southern part of the North Sea (Ekofisk, Eldfisk, Tor, etc) are approximately equidistant from Norway, Denmark and the United Kingdom, and other fields located in the northern part of the North Sea (Statfjord, Gullfaks, Snorre, etc.) are approximately equidistant from Norway and the United Kingdom (Shetland Islands).

The obligation to use a base on the Norwegian mainland to conduct petroleum activities, and/or the obligation to have offices in Norway from where the petroleum activities can be independently managed, to the exclusion of a base or an office in another EEA State, negates the freedom to provide services of undertakings established in another EEA States, as well as the freedom, for licensees, to receive services from sub-contracted undertakings established in other EEA States, guaranteed by Article 36 EEA[13].

Accordingly, the Authority must conclude that the conditions imposed upon licensees by Section 10-2, first and third paragraph, constitute restrictions on the freedom of establishment and the freedom to provide services, guaranteed by Articles 31 and 36 of the EEA Agreement.

IV.4 Norwegian administrative practice

In its letter of 28 September 2009 and during the package meeting in Oslo on 12 November 2009, Norway indicated that Section 10-2 of the Petroleum Act is not applied as stringently as the wording could appear to require.

In its letter of 28 September 2009, Norway indicates that the first paragraph of Section 10-2 must be interpreted in the sense that *"the licensee must see to it that the size and level of competence in his organisation is sufficient for him to make informed decisions about his petroleum activities in Norway at all times*".

The licensee himself will have to define his needs for an organisation in Norway, and how to fulfil his needs, and then present them to the authorities as part of the licensing process.

During the package meeting, Norway indicated that a prudent operator will be expected to be present in Norway. Also, as indicated in the letter of 29 November 2009, the licensee will, *"in most cases, be required to have a minimum level of competence in place in Norway to enable him to understand and follow-up his petroleum activities here*". In particular, Norway indicated that *"there have been examples where certain conditions have been stipulated with regard to the establishment of an organisation in Norway."*

At the same time, Norway indicated that safety and resource management authorities have accepted operators establishing so-called "cross-border" organisations. These

[13] See, in particular, Case C-222/95 *Parodi* [1997] ECR I-3899, paragraph 31; Case C-355/98 *Commission v Belgium* [2000] ECR I-1221, paragraph 27; Case C-439/99 *Commission v Italy*, ECR [2002] I-305 paragraph 30; Case C-171/02 *Commission v Portugal*, ECR [2004] I-5645 paragraph 33; C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraph 46 and Case C-393/05 *Commission v Austria* [2007] ECR I-10195, paragraph 32.

organisations will "*to a large extent, use leaders and experts from the main organisation to carry out the petroleum activities in Norway*". Indeed, Norway noted that "*with improved communications, this way of organising the activities is becoming more common – especially with the large oil companies*".

Norway confirmed during the package meeting, that this means that when a licensee or even an operator requests it, it has been accepted that he carry out petroleum activities in Norway from abroad (for example from the United Kingdom), without any presence on the Norwegian mainland.

If the licensee is an operator (representing the joint venture on behalf of other licensees), the authorities will require more of him than if he has no operating tasks. However, Norway stated that an operator also has "*a large degree of freedom to use external resources (not located in Norway) in fulfilling his obligations*".

Norway thus does not interpret the first paragraph of Section 10-2 as constituting an obligation to establish a fully fledged organisation in Norway. However, it does "*indicate to an oil company wishing to establish itself as a licensee that the risk level and complexity of the petroleum activities here should make him consider carefully how he can best organise himself in order to fulfil all relevant rules and regulations on safety and resource management*".

The practice of the Norwegian Ministry of Petroleum and Energy thus appears to be much more flexible than the letter of Section 10-2 of the Petroleum Act requires.

However, it is settled case-law that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting valid fulfilment of obligations under the EEA Agreement[14].

As indicated previously, Section 10-2 of the Petroleum Act is an imperative provision ("*skal*"), requiring unambiguously that licensees or operators have an organisation which is capable of managing their operations in a self-reliant, self-contained ("*selvstendig*") manner from an establishment on the Norwegian territory. As a result, whatever the current practice may be, Norway could always require from a licensee that he establish a fully fledged organisation in Norway, which should be able to manage the Norwegian activities in a self-reliant manner, thereby restricting their rights guaranteed by the EEA Agreement.

Concerning the requirement of the third paragraph of Section 10-2 of the Petroleum Act that licensees use bases in Norway, Norway indicates in its letter of 28 September 2009 that "*the provision is in practice applied to the effect that the use of bases should not contradict commercial issues in relation to the petroleum activities. Thus ships with support functions, such as supply vessels, anchor handling vessels and pipeline laying ships may be arriving from harbours in any EEA State, as appropriate. Helicopter services may be supplied from those airports in EEA States where it is most practicable.*"

It thus appears that, in its administrative practice, Norway does not apply this provision. But again, mere administrative practices are not relevant in the assessment of the compatibility with the EEA Agreement of the third paragraph of Section 10-2 of the

[14] See, *inter alia*, Case C-465/05, *Commission v Italy*, ECR [2007] I-11091, paragraph 65; Case 168/85 *Commission v Italy* ECR [1986] 2945 paragraph 13.

Petroleum Act, which provides for an imperative requirement that "*the petroleum activities shall be conducted from a base in Norway*".

In any event, even if the requirements laid down in the Petroleum Act were not considered to amount to an obligation that licensees or operators have an organisation which is capable of managing their operations in a self-reliant, self-contained manner from an establishment on the Norwegian territory, and that they use bases in Norway to conduct their petroleum activities, the provisions would still not be in compliance with Article 31 and 36 EEA.

Indeed, even if the interpretation of Norway were to be followed, the provision would not meet the requirements of legal certainty. In that situation it is impossible, by examining the text of the law, to determine that licensees or operators do not necessarily have to have an organisation which is capable of managing their operations in a self-reliant, self-contained manner from an establishment on the Norwegian territory and that they generally do not have to use bases in Norway.

The Court of Justice has consistently held that it is particularly important, in order to satisfy the requirement of legal certainty, 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. Where national law does not live up to this requirement, the non-transparency in itself implies that the provision concerned gives rise to risk of abuse and discrimination[15].

IV.5 Possible justification of the restrictive measures

In its letter of 28 September 2009, Norway argues that, the first paragraph of Article 10-2 of the Petroleum Act is reasonable and justified in view of Article 6 of the Directive.

According to Norway, the first paragraph of Section 10-2 of the Petroleum Act is intended to ensure that the licensee is able to understand his petroleum activities in Norway, to follow-up at all times on his obligations in accordance with Norwegian petroleum legislation, including the legislation on health, safety and the environment, to communicate closely with the Ministry on the functional requirements and ensure a quick access to the responsible and qualified part of the organisation if a critical situation regarding safety should occur, to contribute positively to the activities in which he is engaged in the joint venture to which Norway has attributed the licence and to allow close cooperation between the licensee/operator and employees' organisations so as to ensure that the necessary confidence is in place to carry out operations as safely as possible.

Concerning the third paragraph of Section 10-2 of the Petroleum Act, on the obligation to use a base in Norway, Norway indicated that "*Norwegian authorities must be able to easily monitor and ensure that Norwegian safety and technical requirements, and qualification requirements are understood and applied. Workers being transported to platforms by ship (only in exceptional cases) could of course board them anywhere, but*

[15] See 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-463/00 *Commission v Spain* [2003] ECR I-4581, paragraphs 74-75, 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, and Case C-370/05 *Festersen*, [2007] ECR I-1129, paragraph 43.

stand-by ships, supply ships, crane ships, pipeline-laying ships and so on should as a main rule carry our their activities from bases in Norway, for the same reason as mentioned above."[16]

The Authority does not question the legitimacy of the objectives put forward by Norway, which constitute imperative requirements in the general interest. Nevertheless, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement must also be suitable for securing the attainment of the objective which they pursue and not go beyond what is necessary in order to attain it[17].

In the present case, the Authority considers that the restrictions entailed by Section 10-2 are disproportionate for attainment the legitimate objective pursued.

Firstly, Norway admits that it does not apply Section 10-2 of the Petroleum Act in accordance with its wording. Since Norway generally does not require petroleum undertakings to have an organisation which is capable of managing independently the petroleum activities from Norway, it would seem that Norway acknowledges in practice that this provision is not necessary for attaining the objectives pursued.

Similarly, concerning the third paragraph of Section 10-2, Norway has indicated that it has not been applied since the entry into force of the EEA Agreement. As a result, it would also seem that Norway acknowledges in practice that this provision is not indispensable for attaining the objectives pursued.

Secondly, petroleum activities on the Norwegian Continental Shelf are already subject to an overarching regulatory framework, which fulfils the aims listed by Norway as justifying Section 10-2 of the Petroleum Act.

In compliance with the Directive, production licences are granted on the basis of public announcements, to which all interested parties can apply. Selection from among the various applicants is based on their technical and financial capabilities and the way in which they propose to explore and bring into production the geographical area in question[18].

To apply for such a licence, the applicants will have to provide detailed information concerning their activities, including financial capacity, information concerning experience and technical competence of significance to the area opened for licensing, and a description of the organisation and expertise which the applicant will have available in Norway and elsewhere in connection with the area to which the application for a production licence applies[19].

Once an undertaking has obtained a production licence, every aspect of its activity will be authorised and/or monitored by the Norwegian authorities, through reports and applications by the licensee[20]. The licensees must also notify the Ministry of any

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[16] Email from the Ministry of Petroleum and Energy of 20 April 2009.

[17] Concerning freedom to provide services, see Cases C-369 & 376/96 *Arblade* [1999] ECR I-8453, paragraph 35. Concerning the freedom of establishment, see Case C-94/55 *Gebhard* [1995] ECR I-4165, paragraph 37.

[18] Section 10 of the Petroleum Regulation.

[19] Section 8 of the Petroleum Act.

[20] See Section 9-6 of the Petroleum Act and Sections 16 to 30a of the Petroleum Regulation.

incident[21]. The provisions relating to all those applications, authorisations and reports contain specific and detailed requirements to ensure adequate management of hydrocarbon resources, safety of operations, protection of the environment, and safeguard the need to secure tax revenues.

Moreover, the Norwegian authorities have extensive regulatory investigative powers to ensure that the provisions of the petroleum legislation are being complied with[22].

Moreover, in case of violation of the Act and the Regulation, the Norwegian authorities can impose fines and temporary suspension of the activities[23], revocation of the licence[24], or launch penal proceedings resulting in possible fines or imprisonment[25].

Finally, it must be noted that the licensees can be required to provide security for the fulfilment of their obligations, as well as for possible liability in connection with petroleum activities[26].

Concerning exploration licensees, which concern activities of a more temporary and less risky nature, are required to provide the Norwegian authorities with detailed information about the activities before they are undertaken and weekly updates to the Norwegian authorities as the activities are being undertaken. Concerning security of transport, the licensees must insert an advertisement in "Etteretninger for Sjøfarende" ("Notifications to Seafarers") with information regarding the exact time and place for the activities, the name and speed of the exploration vessel and the length of seismic cables, if any[27]. Finally, licensees must nominate a fishery expert[28].

It must also be noted that the extensive regulatory investigative powers and the sanctions mentioned above apply both to exploration and production licensees.

As a result of this regulatory regime, only reputable and experienced companies are awarded licences. Once a licence is granted, all aspects of the licensee's activity are controlled by the Norwegian authorities before any specific petroleum activity is undertaken, and then monitored as it is undertaken, with significant sanctions in case of violation of the regulatory regime. This can go as far as penal sanctions or the withdrawal of the licence, which can have heavy consequences for an undertaking, in view of the significant investments involved in petroleum activities.

In view of these *ex ante* and *ex post* authorisation and monitoring regimes it is difficult to see how any aspect of the licensees' activity could escape the control of the Norwegian authorities. It is unclear why Norwegian law would need to require undertakings to manage all their petroleum activities from Norway, in order to ensure that the operators are equipped with the knowledge and competences necessary to carry out the petroleum activities according to Norwegian rules, something which is a condition for the grant of the licence.

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[21] Section 79a of the Petroleum Regulations.
[22] See, in particular, Sections 9-2, 10-3 and 10-4 of the Petroleum Act and Section 81 of the Petroleum Regulation.
[23] Section 10-16 of the Petroleum Act.
[24] Section 10-14 of the Petroleum Act.
[25] Section 10-17 of the Petroleum Act.
[26] Section 10-7 of the Petroleum Act and Section 73 of the Petroleum Regulation.
[27] Section 6 of the Petroleum Regulation.
[28] Section 6 of the Petroleum Regulation.

As the attainment of the imperative requirements in the general interest invoked by Norway are already safeguarded through the other regulatory requirements of the Petroleum Act and Regulations, it is submitted that the requirements of the first and third paragraphs of Section 10-2, as they currently stand, are not necessary in that respect. This provision thus goes above and beyond what is necessary to attain those imperative requirements in the general interest.

Thirdly, the objective of facilitating immediate contact with the licensees or the operators, when required, could be ensured just as well through less restrictive requirements.

As has been repeatedly held by the Court of Justice and the EFTA Court, in order for a restriction of the fundamental freedoms to be a necessary means of attaining a legitimate public interest objective, it is not sufficient that this restriction is an easier way of making undertakings act in a certain way. It must be demonstrated that other less restrictive forms of control, even if administratively more burdensome, may not achieve the relevant public interest objectives in an equally effective way[29]. That principle applies with even greater force where the derogation in question amounts to preventing the exercise of one of the fundamental freedoms guaranteed by the EEA Agreement[30]. Moreover, the Court of Justice and the EFTA Court have repeatedly stressed that considerations of an administrative nature cannot justify derogation by a EEA State from the rules of EEA and EU law[31].

In the present case, the Authority considers that neither the independent management requirement nor the need to use Norwegian bases is indispensable for Norwegian regulatory oversight, in view of the fact that for the sector concerned, the activities are supervised through the licensing, permitting and monitoring obligations, through the submission of documentation to the Norwegian authorities, as well as through physical inspections on the Norwegian Continental Shelf.

Moreover, it would appear that the facilitation of a dialogue with the licensees could be ensured just as effectively through modern telecommunication techniques such as video-conferencing, email, telephone and fax, which do not necessitate a physical presence at a particular location at all times to carry out a dialogue. The same means of communication allow for quick and efficient transmission of information and of documents. Finally, in situations where physical presence is necessary, modern means of transportation, such as air travel, would seem to provide good and frequent connection to and from Norway.

Fourthly, the fact that Section 10-2 allows the Norwegian authorities to waive the residency requirement does not justify that provision.

It is settled law that the mere fact that a competent authority is empowered to grant exemptions or derogations cannot justify a national measure which is contrary to EEA law, even if that power is freely used[32].

Furthermore, in any event, the criteria for the application of this possible derogation from the residency requirement, which are not in the text of provision but merely mentioned in

[29] Case E-2/06, *ESA v Norway (Waterfalls)* [2007] EFTA Ct. Rep. 167, paragraph 88; Case 205/84, *Commission v Germany* [1986] ECR 3755, paragraph 54,

[30] Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 45.

[31] See, in particular, Case 29/82 *Van Luipen* [1983] ECR 151, paragraph 12.

[32] See, in particular, Case C-221/89 *Factortame II* [1991] ECR I-3905, paragraphs 38.

the preparatory legislative works[33], does not render the residency requirement compatible with Articles 31 and 36 EEA, because of the vagueness of the exemption possibility, the lack of clarity as to its scope and the lack of legal certainty and transparency.

Indeed, in order to satisfy the combined requirements of proportionality and legal certainty, it is essential that individuals have the benefit of a clear and precise understanding of their rights and obligations enabling them to ascertain the full extent of their rights and, where appropriate, to rely on them before the national courts. Therefore, it is not merely a general goal, but a requirement for the compatibility with EEA law that national rules restricting free movement should be worded unequivocally[34]. The possibility to award derogations to the residency requirement of Section 10-2 of the Petroleum Act does not satisfy these requirements.

Firstly, the requirements are not put down in the Act or the Regulations, but may only be found in the preparatory legislative work, which appears not to afford sufficient legal certainty or transparency.

In addition, the wording used in the preparatory work is too vague. It mentions a simple exemption "*possibility*", which therefore leaves full discretion to the national authorities as to whether they will grant it or not. Furthermore, it mentions that this exemption would apply to companies with activities of a "*small economic scale*", the assessment depending on a "*concrete overall assessment*", with factors which "*include*" (but are not limited to) unspecified "*safety issues*", the licensee's holding in the acreage and field, and to what extent the licensee will be able to be represented in Norway through other means. The preparatory work mentions, as an example, the waiver for a company with a "*small holding*" in a single permit licence, represented in Norway through a company with holdings in the same production licence.

In fact, it is submitted that Norwegian law fails to give a petroleum undertaking wishing to exercise its activities in Norway sufficiently transparent, legally certain and operable criteria as to the conditions to fulfil in order to obtain a derogation to manage its activities or part of its activities from another EEA State.

As a result, even if the mere fact that the competent authority is empowered to grant exemptions or derogations were be able to justify a national measure which is contrary to the EEA Agreement, the uncertain enforceability of the criteria and the vague and unclear wording used would appear to prevent the restrictions in Section 10-2 of the Petroleum Act from being justifiable.

As a result of all of the above, the restriction to the freedom of establishment and the freedom to provide services entailed by Section 10-2 of the Petroleum Act goes beyond what is necessary to attain the objectives invoked by Norway.

Accordingly, the Authority must conclude that, by maintaining in force Section 10-2, first and third paragraph, of the Petroleum Act, Norway is in breach of Articles 31 and 36 of the EEA Agreement.

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[33] Ot.prp. nr. 46 (2002-2003), p.27-28.

[34] Case C-370/05 *Festersen* [2007] ECR I-1129, paragraphs 43-44, Case C-496/99P *Succhi di Frutta* [2004] ECR I-3801, paragraph 111, Case C-478/01 *Commission v Luxembourg* [2003] ECR I-2351, paragraph 20, Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraphs 46-47 and 52, and Case C-56/01 *Inizan* [2003] ECR I-12403 paragraph 57.

IV.5 Violation of the Directive

According to Article 6(1) of the Directive, EEA States *"shall ensure that the conditions and requirements referred to in Article 5(2) and the detailed obligations for use of a specific authorization are justified exclusively by the need to ensure the proper performance of the activities in the area for which an authorization is requested, by the application of paragraph 2 or by the payment of a financial contribution or a contribution in hydrocarbons."*

It results from this provision that conditions and requirements, in the sense of Article 5(2) of the Directive, may only be imposed if they are justified by the need to ensure the proper performance of the petroleum activities or by the various imperative requirements in the general interest listed in Article 6(2).

The conditions and requirements referred to in Article 5(2) are those *"concerning the exercise or termination of the activity which apply to each type of authorizations by virtue of the laws, regulations and administrative provisions in force at the time of submission of the applications, whether contained in the authorization or being one of the conditions to be accepted prior to the grant of such authorization"*.

Section 10-2, first and third paragraph, of the Petroleum Act constitutes such a condition or requirement, and thus must be justified by the need to ensure the proper performance of the petroleum activities or by the various imperative requirements in the general interest listed in Article 6(2) of the Directive.

As Article 6(2) of the Directive is a derogation provision it must be interpreted restrictively. This applies in particular to the extent the provision allows for derogations to the fundamental freedoms guaranteed by the EEA Agreement. Measures based on Article 6(2) can thus only be accepted if they are necessary, suitable and proportionate to the invoked legitimate objectives.

For the reasons outlined above, the Authority considers that the conditions in 10-2 of the Petroleum Act are not necessary for the proper performance of the activities. Similarly, with reference to the above, the Authority is of the opinion that they cannot be justified on the basis of Article 6(2) of the Directive as they go beyond what is necessary to attain the objectives invoked by Norway.

Accordingly, the Authority must conclude that by maintaining in force Section 10-2 of the Petroleum Act, Norway is in breach of Article 6 of the Directive.

EFTA SURVEILLANCE AUTHORITY

V Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force a requirement that hydrocarbon licensees have a structure capable of managing the hydrocarbon activities independently from Norway, as well as a requirement that all hydrocarbon activities be conducted from a base in Norway, such as laid down in Section 10-2, first and third paragraph, of the Petroleum Act, Norway has failed to fulfil its obligations arising from Articles 31 and 36 of the EEA Agreement and Article 6(1) of the Act referred to at point 12 of Annex IV to the EEA Agreement (*Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons*), as adapted to the EEA Agreement by Protocol 1 thereto.

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 *within two months* following receipt thereof.

After the time limit has expired, the Authority will consider, in the 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,

Kristján Andri Stefánsson
College Member