



ROYAL NORWEGIAN MINISTRY OF
TRADE, INDUSTRY AND FISHERIES

EFTA Surveillance Authority (ESA)
Rue Belliard 35
B-1040 BRUSSELS

Your ref	Our ref	Date
Case no. 79718 Document no. 824544	16/6583-2	13.1.17

Complaint against Norway concerning the prohibition of snow crab catching - Case no. 79718

Dear Ms. Somers,

Reference is made to EFTA Surveillance Authority's (hereinafter the Authority), letter dated 5 December 2016 in which the Norwegian Government is invited to comment on the substance of the complaint and provide any information it deems relevant to the case.

The complainant holds inter alia that nationals from other EEA states are prevented from establishing a company in Norway which could engage in commercial fishing of crab. It is stated that the legislation confers an unjustified privileged access to vessels owned by Norwegian citizens and Russian vessels to fishing of snow crab in the maritime zones of Norway, in particular Svalbard Fisheries Protection Zone and Norwegian continental shelf. The complainant states that the legislation is not consistent with Articles 4, 31(1), 34, 36(1), 124 of the EEA Agreement and Article 5 of Protocol 9 to the Agreement.

Please find the Government's observations below.

The legislation in question is the regulation of 19 December 2014 on prohibition of snow crab catching and the Participation Act of 26 March 1999. The Act regulates who can fish for a living and states that a vessel cannot be used for commercial fishing unless a commercial licence has been issued. Only Norwegian citizens and active fishermen can be issued a commercial licence. These principles serve in part to ensure that the returns on the fisheries activities go to the active fishermen in the coastal communities. A commercial licence alone is however not sufficient as most of the fisheries have limited entry. Such limitations is necessary in order to ensure a stable resource basis.

Whether a vessel flying a foreign flag should be granted access to a fishery under Norwegian management would depend on a bilateral agreement between Norway and the country of origin of the vessel.

It is common ground that fishery policy is outside the scope of the EEA Agreement. It is explicitly stated in the Joint Declaration on the agreed interpretation of Articles 4 (1) and (2) of Protocol 9 on trade in fish and other marine products. The relationship between the Contracting Parties in this area is further expressed in Protocol 46 to the EEA Agreement which states that the Contracting Parties will seek to develop the cooperation on a harmonious, mutually beneficial basis and within the framework of their respective fisheries policies. The Norwegian fisheries cooperation with the European Union (EU) is based on a bilateral agreement.

Even though the fishery policy is outside the scope of the EEA Agreement the complainant apparently holds that the policy should be exercised in conformity with the obligations arising from the EEA Agreement.

The EEA Agreement, does not, however, apply to all products. Article 8 (3) provides that products not covered by its points (a) and (b) fall outside the scope of application of “the provisions of this Agreement”. Accordingly, fishery products are in principle outside the scope of the EEA Agreement. Snow crab is not among those products referred to in Article 8 (3).

This means that neither the main provisions of the Agreement nor its Protocols or Annexes apply to products that fall outside the product coverage of the Agreement.¹ Admittedly, some exceptions do exist, but the application of any part of the Agreement to products outside the scope must be “specified”. One example can be found in Article 21 (4) of the Agreement. Article 21 concerns cooperation in customs-related matters and trade facilitation. The provision makes reference to simplification of border controls and formalities and assistance in customs matters, amongst others. In Article 21 number 4 it is clearly specified that “*Notwithstanding Article 8 (3), this Article shall apply to all products.*” It is indeed clear that the application of this provision shall be wider than the general scope of the Agreement. Consequently, the Contracting Parties have been quite explicit when wanting to let certain parts of the EEA Agreement apply.

Article 20 of the EEA Agreement states that provisions and arrangements that apply to fish and other marine products are set out in Protocol 9. This Protocol forms an independent set of rules and can be regarded as a *lex specialis* for fish and other marine products.

Further, the Government would indeed refer to the explicit exemptions provided in Annex VIII, point 10 of the EEA Agreement concerning right of establishment and Annex XII, point 1h of the EEA Agreement on free movement of capital. The two exemptions leave no doubt

¹ See Case E-1/16 *Synnøve Finden*, paragraph 57.

that the provisions in the main part of the EEA Agreement regarding restrictions on the freedom of establishment in Article 31 and restrictions on the movement of capital in Article 40, do not apply.

Concerning the allegation that section 5a in the Participation Act regulating residence quotas for the crew on board Norwegian vessels, is in breach of EEA legislation the Government would draw attention to the fact that the wording of the section was adjusted following a reasoned opinion of the Authority in case no. 2229, dated 2 April 2004. Another complaint (case no. 70804), on the same provision in 2011 was forwarded to the Norwegian authorities and after receiving the observations from Norway the Authority 11 July 2012 decided to close the case. Consequently there should be no reason to conclude differently in the current case. The Government would underline that the provision in question has been moved from Section 3 paragraph 2 in the Fisheries Act of 17 June 1966 (lov 17. juni 1966 nr. 19 om forbud mot at utlendinger driver fiske m.v i Norges territorialfarvann), to the Participation Act section 5a and even though some of the wording in section 5a is slightly different, that is due to technical reasons following the movement to another Act, the legal content regarding residence requirements has remained unchanged.

In addition of the allegations concerning breach of provisions in the main part of the EEA Agreement, the complainant has stated that the Norwegian legislation is also in breach of Article 5 in Protocol 9. The Government would hold that Article 5 regulates access to ports and first-stage marketing installations and fails to see how the Norwegian regulations about access to fishing activities of snow crab are in breach of this Article. As a matter of fact, EU vessels are taking advantage of a bilateral agreement between Norway and the EU concerning the right to transit fish through Norway without having to sell the landed fish through or with the approval of a sales organization. Accordingly, EU vessels are treated in a more favourable way than other vessels.

The complainant also refers to sources of law unrelated to the EEA Agreement, including the 1980 Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries (the NEAFC Convention), the 1920 Treaty concerning Spitsbergen (the Svalbard Treaty), and the 1982 United Nations Convention on Law of the Sea (UNCLOS). The Government is of the opinion that the complainants' understanding of the said sources is incorrect, and reserves its position with regard to the opinions expressed by the claimant with respect to these sources. However, the Government does not elaborate further on this as it finds the mentioned sources of law to be irrelevant for the Authority when considering questions under the EEA Agreement.

In the view of the Government the complaint is without merit. The Government will be ready to provide further information and analysis should the Authority so wish.

Yours sincerely,

Yngve Torgersen
Acting Director General

Geir Evensen
Deputy Director General

This document has been signed electronically and therefore it is not signed by hand.

Adressliste

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